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Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

EMMANUEL E. UBIÑAS-BRACHE, M.D.,

Petitioner,

v.

DALLAS COUNTY MEDICAL SOCIETY
and TEXAS MEDICAL ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, FOR THE FIFTH DISTRICT OF TEXAS, AT DALLAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. After *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), can state contract law providing that a medical doctor has no recognized contract rights against a medical society of which he is a member, authoritatively establish that no contract existed for purposes of the Article I, § 10 Contracts Clause of the United States Constitution?

2. Does a medical doctor's contract right to a fair and good faith disciplinary proceeding as a member of a medical society amount to a protected property interest under the Due Process Clause of the Fourteenth Amendment that may be enforced by declaratory relief and injunction?

3. Does a medical society qualify as a state actor for purposes of the Due Process Clause of the Fourteenth Amendment if the society conducts disciplinary proceedings against a physician under the protection of a far-reaching state law immunizing the society from legal liability, including declaratory relief and injunction?

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Emmanuel E. Ubiñas-Brache, M.D. ("Dr. Ubiñas") respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth District of Texas, at Dallas, in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth District of Texas at Dallas (App. *infra* 1a-24a) is unreported, but may be found at 2001 WL 100180 (Tex. App. - Dallas).

STATEMENT OF JURISDICTION

The Texas Court of Appeals entered its judgment on February 7, 2000. (App. *infra* 23a-24a). On October 18, 2001, the Texas Supreme Court overruled Dr. Ubiñas' motion for rehearing on petition for review. (App. *infra* 31a-32a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

This petition is being served on the Attorney General of Texas pursuant to Sup. Ct. R. 29.4(c). 28 U.S.C. § 2403(b) may apply in this proceeding.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 10, clause 1 of the United States Constitution provides, in relevant part, that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." U.S. CONST. Art. I, § 10, cl. 1.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part,

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

> person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. 14th Amendment.

Former TEX. REV. CIV. STAT. ANN. arts. 4495b, sec. 1.03(a)(5), (6), (9), 5.06(*l*), (m) (the "amended Act") (repealed 1999) provided that:

> Sec. 1.03 DEFINITIONS: (a) In this Act:
>
> (5) "Health-care entity" means: . . . (C) a professional society or association, or committee thereof, of physicians that follows a formal peer review process for the purpose of furthering quality medical or health care.
>
> (6) "Medical peer review committee" or "professional review body" means a committee of a health-care entity, the governing board of a health-care entity, or the medical staff of a health-care entity, provided the committee or medical staff operates pursuant to written bylaws that have been approved by the policy-making body or the governing board of the health-care entity and authorized to evaluate the quality of medical and health-care services or the competence of physicians. Such a committee includes the employees and agents of the committee, including assistants, investigators, intervenors, attorneys, and any other persons or organizations that serve the committee in any capacity.

* * *

(9) "Medical peer review" or "professional review action" means the evaluation of medical and health-care services, including evaluation of the qualifications of professional health-care practitioners and of patient care rendered by those practitioners. The term includes evaluation of the merits of complaints relating to health-care practitioners and determinations or recommendations regarding those complaints. The term specifically includes evaluation of:

(A) accuracy of diagnosis;

(B) quality of care rendered by a health-care practitioner;

(C) reports made to a medical peer review committee concerning activities under the committee's review authority;

(D) reports by a medical review committee to other committees or to the board as permitted or required by law; and

(E) implementation of the duties of a medical peer review committee by its members, agents, or employees.

Sec. 5.06(*l*) "A cause of action does not accrue against the members, agents, or employees of a medical peer review committee or against the health-care entity from any act, statement, determination or recommendation made, or act reported, without malice, in the course of peer review as defined by this Act."

Sec. 5.06(m) "A person, health-care entity, or medical peer review committee, that, without malice, participates in medical peer review activity or furnishes records, information, or assistance to a medical peer review committee or the board is immune from any civil liability arising from such an act."

STATEMENT OF THE CASE[1]

Petitioner, Dr. Emmanuel E. Ubiñas-Brache, is a physician licensed to practice medicine in the State of Texas. Tr. 8. In 1984, Dr. Ubiñas voluntarily joined the Dallas County Medical Society ("DCMS"), a private medical association. (4 SF 439:23-25; 4 SF 484:6-12). On June 1, 1993, following a disciplinary proceeding, the DCMS issued an order expelling Dr. Ubiñas from the DCMS. Dr. Ubiñas appealed this disciplinary order to the Texas Medical Association ("TMA") which upheld the DCMS's ruling.

Dr. Ubiñas then filed suit in the 44th Judicial District Court of Dallas County, Texas, seeking to declare null and void the action of the DCMS on the basis that the procedures utilized by the Society at the disciplinary proceeding failed to comply with the standards required for such proceedings

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1. Under Texas appellate rules, the record on appeal consists of two parts, the Transcript and the Statement of Facts. The Transcript consists of the pertinent pleadings filed in the trial court. The Statement of Facts refers to the transcribed record of the trial. Citations herein to "SF" shall refer to the Statement of Facts, and "TR" shall refer to the Transcript. Citations P.Ex. and D.Ex. shall refer to Plaintiff's and Defendant's exhibits respectively. In addition, at trial the parties stipulated to the introduction of the DCMS Disciplinary Hearing transcript. References to this transcript are denoted as "DH __."

as provided in a disciplinary agreement incorporated in the DCMS's bylaws. At the conclusion of the state court trial, a jury returned a charge finding that the DCMS and TMA (i) had failed to provide Dr. Ubiñas "fundamental fairness and a fair and good faith proceeding" as mandated in the disciplinary agreement, and (ii) Dr. Ubiñas would suffer immediate and irreparable harm as a result of the DCMS's and TMA's failure to provide him with "fundamental fairness and a fair and good faith proceeding." (App. *infra* 25a-28a). Based on the jury's findings, the trial court entered a final judgment for Dr. Ubiñas setting aside the DCMS's expulsion order, and permanently enjoining the DCMS and TMA from both expelling Dr. Ubiñas and from disseminating any report of sanctions to various entities. (App. *infra* 25a-28a). On appeal, the Court of Appeals for the Fifth District of Texas, at Dallas reversed the trial court's judgment and rendered judgment for the DCMS and TMA. (App. *infra* 1a-24a). The Texas Supreme Court denied review of the appellate court's judgment. (App. *infra* 29a-32a).

A. Dr. Ubiñas' Membership in the DCMS

In 1984, Dr. Ubiñas voluntarily joined the DCMS, a private association of physicians whose function is to provide its members with certain benefits, foster its members' education, and facilitate the resolution of disputes between its members and their patients. (3 SF: 214:21 - 215:5; App. *infra* 3a). A physician does not have to be a member of a county medical society or the TMA to practice medicine in the State of Texas. (3 SF 215:7-10). The DCMS is a chartered member of the TMA. (App. *infra* 3a). While membership is ostensibly voluntary, once a disciplinary action is started the physician cannot voluntarily resign. (2 SF 179:4-6; 3 SF 285:9-18; P.Ex. 1, § 1.80). The DCMS is incorporated under

Texas law and in accordance with the constitution and bylaws of the TMA. (Article V, DCMS Constitution). Each member of the DCMS must subscribe to the American Medical Association's principles of medical ethics and agree to be bound by the DCMS disciplinary procedures.[2] When Dr. Ubiñas became a member of both the DCMS and TMA he understood that he was agreeing to be bound by their bylaws which he believed constituted contracts to which he and Respondents subjected themselves. (4 SR 485:5-14; 4 SF 486:12-25 – 487:1-18).

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2. Section 11.20 of the DCMS bylaws states: "Disciplinary investigations, hearings and actions shall be carried out in accordance with the Disciplinary Procedures Manual of the Texas Medical Association."

Section 1(b) of the TMA's Hearings Procedures Manual states:

> *Disciplinary Agreement.* By applying for, accepting and maintaining membership in the Association, each member voluntarily agrees:
>
> > Sec. 1. (b)(1) To be bound by and comply with all provisions of the Association's Constitution and bylaws, the approved constitution and bylaws of any county society to which such member belongs, and the Principles of Medical Ethics as to relationships with other members of the Association, with county societies, and with the public; and
> >
> > Sec. 1. (b)(2) To be subject to disciplinary action (including expulsion, probation, or censure) in accordance with the provisions of this Manual with respect to (i) violation of either or both such constitutions and bylaws, (ii) violation of the Principles of Medical Ethics, (iii) criminal conduct or (iv) unprofessional conduct likely to deceive defraud, or injure the public.

At the time Dr. Ubiñas joined the DCMS and TMA, the law as it then existed provided limited immunity from civil liability to certain individuals related to, and members of, peer review committees. *See*, Tex. Ann. Civ. St. art. 4495(b) (Vernon's 1983) ("the original Act").[3] The original Act did not immunize peer review committees from suit. In 1987, the Texas Legislature revised the original Act and included the provisions at issue in this case. *See* Former TEX. REV. CIV. STAT. ANN. arts. 4495b, sec. 5.06(*l*) (the "amended Act") (repealed 1999) (current version at TEX. OCC. CODE ANN. sec. 160.010 (Vernon 2001). These provide certain qualifying health care entities immunity from suit and civil liability for peer review deliberations and related matters. These amendments became effective September 1, 1987.

B. The Disciplinary Proceedings

The disciplinary proceeding against Dr. Ubiñas arose from complaints relating to three patients upon whom he performed hand surgery between January and October 1991.

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3. Section 5.06(f) provided: "the following persons are immune from civil liability":

> (1) a person reporting to or furnishing information to a medical peer review committee;
>
> (2) a member, employee, or agent of the medical peer review committee who assists in the organization, investigation, or preparation of information or who makes a report on other information available to the board pursuant to this subsection; and
>
> (3) any member or employee of the board or any person who assists the board in carrying out its duties or functions provided by law.

All three had excellent surgical results. None of the DCMS's findings against Dr. Ubiñas relate to physical harm or injury to any patients, and at no time was a patient's health or safety at risk. In each case, the patient suffered traumatic hand injuries. The patient was examined in the emergency room by a physician who determined that the injuries were too severe to be repaired in the emergency room, but required repair in the operating room by a skilled hand surgeon. Dr. Ubiñas was called to the hospital to treat the patient. In each case, Dr. Ubiñas surgically repaired the patient's hand.

The TMA Manual, which is incorporated into the DCMS bylaws, provides that each member agrees to be subject to disciplinary action in accordance with the provisions of this Manual. The TMA Manual also provides that all matters relating to disciplinary action, including hearings and proceedings, that involve any member of the DCMS, shall be administered in accordance with the following principles:

> Sec. 1.(c)(1) To the maximum extent possible all . . . disciplinary matters should be handled and decided on a physician-to-physician peer basis and on the merits of the substantive issues involved instead of on procedural or technical grounds.
>
> Sec. 1.(c)(2) Due process . . . does not require a judicial court-type trial, hearing, or proceeding, but rather what is required is fundamental fairness . . . consisting in general, of adequate notice of the nature of each complaint or charge . . . ; adequate notice of any applicable hearing; adequate opportunity to be heard and present a defense there at; and a *fair and good faith proceeding.*

(emphasis added).

The DCMS conducted a hearing on April 26, 1993, on the three complaints. Contrary to the DCMS's bylaws, the proceedings were not kept confidential. (2 SF 176:10-16; 2 SF 178:2-16; 3 SF 327:1-16). The DCMS did not credit evidence presented by its own expert witnesses. (P. Ex. 14, p.2; P. Ex. 19). It relied on information later shown to have been erroneous, and provided to it by a physician with whom Dr. Ubiñas had an acrimonious relationship. (SF 141:3-5; 2 SF 158:16-160:5; 3 SF 359:9-11; 3 SF 369:7-13; 3 SF 365:6 - 367:25). Physicians who investigated the charges against Dr. Ubiñas later sat on the committees hearing the evidence. (2 SF 165:25-166:7; SF 348:14-22; 4 SF 602:13-15). The only medical ethics expert in the TMA, whose job is normally to provide advice on ethics to the committee that sat in judgment of Dr. Ubiñas, switched roles and argued the case against him before the same committee he advises. (3 SF 373:15-374:7; 374:17-375:10). That same attorney was present when the DCMS deliberated on its original decision to discipline Dr. Ubiñas, and drafted the decision expelling him. (3 SF 310:23-311:1; 379:2-19; 3 SF 379:20-380:1).

On June 1, 1993, the DCMS entered its disciplinary order. (P.Ex. 13). The DCMS did not conclude that Dr. Ubiñas harmed his patients or engaged in any medical practice that adversely impacted their physical well-being. (P.Ex. 13). Rather, it found that Dr. Ubiñas had violated the AMA Principles of Medical Ethics. (P.Ex. 13). Although it was undisputed that each patient required surgical intervention, the DCMS concluded that certain surgical procedures performed by Dr. Ubiñas were not medically necessary, or that Dr. Ubiñas failed to establish that he had actually performed a procedure. (P. Ex. 13, pp. 2-3).

Dr. Ubiñas appealed the disciplinary order to the TMA, which is the DCMS's parent organization. (4 SF 557:16-20). The TMA heard oral argument on November 19, 1993. (D. Ex. 40). On February 26, 1994, the TMA issued its opinion upholding the DCMS's order. The TMA concluded that Dr. Ubiñas failed to establish that the DCMS's decision was against the great weight and preponderance of the evidence. Ex. D-27.

C. The Decisions of the Trial and Appellate Court

Dr. Ubiñas initiated the instant case by filing suit in the 44th Judicial District Court of Dallas County, Texas, seeking a declaration that the actions of the DCMS were null and void. He sought only declaratory and injunctive relief, not damages. (App. *infra* 6a). Dr. Ubiñas contended that the DCMS's actions breached a disciplinary agreement incorporated in the society's bylaws and violated his right to due process. The suit was tried to a jury, which found in favor of Dr. Ubiñas. (App. *infra* 25a-28a). In response to question number one of the charge, the jury found that both the DCMS and the TMA had failed to provide ". . . [Dr. Ubiñas], a member subject to disciplinary action, with fundamental fairness and a fair and good faith proceeding[.]" (App. *infra* 6a).

In response to question two of the charge, the jury found that the DCMS's and TMA's failure to provide Dr. Ubiñas the requisite process under the bylaws caused Dr. Ubiñas immediate and irreparable harm. (App. *infra* 7a). Based on the jury's charge, the trial court entered its final judgment declaring the DCMS's disciplinary action null and void and of no force and effect, and permanently enjoining the DCMS and TMA from both expelling Dr. Ubiñas and from disseminating any report of sanctions to various entities. (App. *infra* 25a-28a).

The Texas Court of Appeals reversed the trial court's judgment and rendered judgment for Respondents. (App. *infra* 2a). The Texas Court of Appeals held that sections 5.06(*l*) and 5.06(m) of the amended Act barred breach of contract actions against the DCMS and TMA. (App. *infra* 10a-11a). The court held that the amended Act permits suit only where the plaintiff pleads malice, and, Dr. Ubiñas had not pled malice. (App. *infra* 12a).

The Texas Court of Appeals concluded that enforcement of the immunity provisions of the amended Act did not violate Dr. Ubiñas' right to access to the courts to enforce his contract rights. (App. *infra* 18a). The court found that a breach of contract action to maintain membership in a private association was not a well recognized or well defined common law action in Texas because of the Texas common law doctrine of judicial non-intervention. (App. *infra* 13a-18a). The Court noted that to maintain a suit on the contract in these circumstances at common law, a plaintiff would have to show that the organization's actions were illegal, involved some civil or property right, were against public policy, or were arbitrary or capricious. (App. *infra* 17a). In light of this high common law threshold, the court determined that the amended Act's malice requirement was a reasonable substitute for suit against a voluntary association for expulsion from membership. (App. *infra* 18a).

REASONS FOR GRANTING THE WRIT

Disregarding this Court's holding in *General Motors Corp. v. Romein*, 503 U.S. 181 (1992) that the court must apply federal law to decide whether there is a contract under the Contract Clause, the Texas Court of Appeals applied state law to find that Dr. Ubiñas did not have a contract right against the Dallas County Medical Society, of which he was member. In doing so, the Court of Appeals followed the lead of at least four

other state and federal courts. Under federal Constitutional law, however, there is a contract between Dr. Ubiñas and the DCMS. The Court of Appeals also refused to address the issue of whether the Due Process Clause applied in this case, where a medical doctor was deprived of a contract right to a fair disciplinary proceeding but where the medical society was found to have nearly complete immunity from suit under state law.

The Court should grant Dr. Ubiñas' petition because: (1) several federal and state courts since *General Motors*, including the Texas Court of Appeals below, have ignored this Court's holding in *General Motors* that, in Contracts Clause cases, federal common law must be applied to determine whether a contract exists, thus creating a conflict concerning the applicability of federal law in Contract Clause cases that requires clarification; (2) the difficult question of when a contract right is also a property right for purposes of the Due Process Clause has divided the federal courts and should be resolved; and (3) the Court should articulate exactly what qualifies an entity as a state actor, an unsettled area of the law that unduly complicates the litigation of Due Process claims.

I. The Texas Medical Practices Act Violates the Constitutional Prohibition Against Impairment of Contracts.

Article I, Section 10 of the United States Constitution provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." The Court has consistently interpreted this Clause to restrict state sovereignty when state law "effects substantial modifications of private contracts." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978).

The threshold inquiry is whether state law has "operated as a substantial impairment of a contractual relationship." *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). If it has, then the state must show that the law has a "significant and legitimate public purpose." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). The state must also show that the law is "reasonable and necessary" to serve that public purpose. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25-26 (1977).

The Texas Medical Practices Act has substantially impaired Dr. Ubiñas' contractual relationship with the DCMS and TMA. The significant impairment caused by the amended Act in the contractual relationship between Dr. Ubiñas and the DCMS and TMA is not reasonable or necessary to serve a significant public purpose.

A. Dr. Ubiñas' Contractual Relationship with the DCMS and TMA Has Been Substantially Impaired.

The Court's threshold inquiry "has three components: whether there is a contractual relationship, whether a change in the law impairs that contractual relationship, and whether the impairment is substantial." *General Motors Corp.*, 503 U.S. at 186. All three are satisfied in this case.

1. There is a Contract Under Federal Law. The Texas Appeals Court Erroneously Applied State Law to Determine Whether Dr. Ubiñas Had A Contract Right.

In 1992, this Court squarely held that "the question whether a contract was made is a federal question for purposes of Contracts Clause analysis." *General Motors*

Corp., 503 U.S. at 187. Yet, since then, some courts have continued to apply state law to determine whether a contract exists. *Kestler v. Board of Trustees of North Carolina Local Government*, 48 F.3d 800 (4th Cir. 1995) ("Initially, we note that the issue of whether a contract right exists is governed by state law, while federal law governs a determination that a contract has been impaired under the Contract Clause."); *Andrews v. Anne Arundel County*, 931 F. Supp. 1255, 1264 (D. Md. 1996), *aff'd*, 114 F.3d 1175 (4th Cir. 1997) ("In determining whether legislation creates a contract for purposes of Contract Clause analysis, the law of the state in which the legislation was enacted is determinative"); *Alston v. City of Camden*, 322 S.E.2d 174, 177 (S.C. 1996) ("The existence of a contract generally [under the South Carolina and federal Contracts Clauses] is a question of state law."); *Miracle v. North Carolina Local Government Employees Retirement System*, 477 S.E.2d 204, 207 (N.C. App. Ct. 1996) (applying state contract law to determine when plaintiff's contractual rights vested).

In this case, the Texas Court of Appeals likewise erred by relying on state law to determine that Dr. Ubiñas had no well recognized contract action. (App. *infra* 17a). Federal contract law requires a different result. *See Austin v. American Ass'n of Neurological Surgeons*, 253 F.3d 967, 968-69 (7th Cir. 2001) (Posner, J.) ("Ordinarily a dispute between a voluntary association and one of its members is governed by the law of contracts, the parties' contractual obligations being defined by the charter, bylaws, and any other rules and regulations of the association that are intended to create legally enforceable obligations.").

When Dr. Ubiñas became a member of the DCMS, he agreed that his relationship with the DCMS would be

governed by the DCMS's bylaws and the TMA's Hearing Manual, and that he would conduct his medical practice in accordance with the high ethical standards set out in the Principles of Ethics of the American Medical Association. The TMA's Hearing Manual expressly provides that "[b]y applying for, accepting and maintaining membership in the Association, each member agrees . . . [t]o be bound and comply with all provisions of the Constitution and Bylaws, [and] the approved constitution and bylaws of any county society to which such member belongs."

Applying federal common law, there is no doubt that a contract existed between Dr. Ubiñas and the DCMS. *See Austin*, 253 F.3d at 968-69. Thus, in joining the DCMS, Dr. Ubiñas bound himself to follow the organization's bylaws and constitution. The DCMS and TMA, likewise, bound themselves to apply the requirements and limitations in their bylaws and constitutions in the event of a disciplinary proceeding involving Dr. Ubiñas.

2. The Passage of the Texas Medical Practices Act Impaired the Contractual Relationship Between Dr. Ubiñas and the DCMS.

As a member of the DCMS subject to discipline by that organization, Dr. Ubiñas had a contract right to "fundamental fairness and a fair and good faith proceeding." That contractual right extended from 1984 when Dr. Ubiñas joined the DCMS. That right was abrogated in 1987 by the Texas Medical Practices Act, as interpreted by the Court of Appeals. The impairment of that right by the amended Act is demonstrated by the proceedings in this case.

The trial court, acting on the charge of the jury, found that the DCMS violated Dr. Ubiñas' contract right to a fair and good faith disciplinary proceeding, and enjoined the DCMS from expelling Dr. Ubiñas. The record amply supports the jury's findings. The trial court order would have enforced the contract, but the Appeals Court read the amended Act in effect as abrogating Dr. Ubiñas' contractual right.

3. The Impairment Is Substantial.

It is unnecessary to prove that a contractual relationship was completely destroyed as a result of state law in order to show that the impairment was substantial; evidence of less significant impact is generally sufficient. *Energy Reserves Group, Inc.*, 459 U.S. at 411. In this case, however, the contractual relationship between Dr. Ubiñas and the DCMS has indeed been completely destroyed as a result of the application of the amended Act.

The impact of Dr. Ubiñas' expulsion from the DCMS cannot be overestimated. Undisputed expert testimony at trial showed that Dr. Ubiñas would almost certainly lose his medical practice within three years of being expelled from the DCMS. (3 SF 221:3-18). The DCMS reports the results of its disciplinary proceedings to a data bank that is consulted by hospitals every two years when staff privileges are reviewed. (3 SF 222:12-23). In addition, managed care organizations usually require physicians to disclose any disciplinary actions against them and exclude from their contracts any physician with a record of such disciplinary action. (3 SF 222:24-223:7). Thus, expulsion from the DCMS would eventually leave Dr. Ubiñas with no hospital in which to operate and no insurance network in which to market his services. Even the prospect of a new beginning in another

state would be foreclosed. Before awarding a license to Dr. Ubiñas to practice, a state would likely investigate his disciplinary record. (3 SF 223:8-15).

The substantial impact of the amended Act upon Dr. Ubiñas' contract rights is exacerbated by the history of self-regulation in the medical profession. The extent to which an industry has been regulated by the state in the past is relevant in determining the extent of the impairment. *Energy Reserves Group, Inc.*, 459 U.S. at 411. Where state regulation is pervasive, such as in the oil and gas industries, further regulation is foreseeable. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 194 n.14 (1983).

That is not the case here. The medical profession, through the various peer review processes, is largely self-regulated, as evidenced by the very disciplinary proceeding at the root of this case. Accordingly, a doctor joining a voluntary medical association would not expect that future legislation would impair his rights in the event of disciplinary action. The after-the-fact abrogation of the contractual relationship between Dr. Ubiñas and the DCMS effected by the amended Act is thus all the more substantial.

B. The Impairment of Contract Caused by the Amended Act is Entirely Unreasonable and Serves No Legitimate Purpose in Light of its Apparent Public Policy Goals.

When a law is shown to have substantially impaired a contractual relationship, the burden shifts to the respondent to demonstrate that the impairment is justified as "reasonable and necessary to serve an important public purpose." *United States Trust Co.*, 431 U.S. at 25-26; *Parker v. Wakelin*, 123

F.3d 1, 5 (1st Cir. 1997). The Texas Court of Appeals found that the amended Act promoted "the public policy of having physicians review the actions of physicians" and afforded "some protections for the organizations and the participants in those proceedings." (App. *infra* 18a). Conceding the importance of this public purpose, Dr. Ubiñas contends that the impairment of contract caused by the amended Act in this case is unnecessary, unreasonable, and inappropriate to the ends of the identified public policy.

1. It is Entirely Unreasonable and Inappropriate to Require a Showing of Actual Malice in Cases, Like This One, Where Only Declaratory Relief or Injunction is Sought.

It is unreasonable and unnecessary to preclude declaratory and equitable relief in this case to protect doctors in their review of the conduct of a fellow doctor. The amended Act requires a showing of actual malice before suit can be instituted against the DCMS or similar organization for declaratory relief, damages, or injunction. Damages are not being sought here. In these circumstances, there is absolutely no reason to believe that the prospect of being enjoined from violating the organization's own bylaws and constitution, or enjoined from expelling a particular member who was treated unfairly by the disciplinary process, would have a chilling effect on individual doctors' or medical associations' participation in the review process. Yet, in this case the Court of Appeals applied the amended Act to dissolve an injunction against the DCMS and TMA that would have merely prevented those organizations from violating their own bylaws and constitutions, and barred them from expelling Dr. Ubiñas based on an inadequate disciplinary process.

The unreasonable breadth of the amended Act is demonstrated by its incongruity with federal and state immunity law. Under 42 U.S.C. § 1983, state employees may be sued in state or federal court for violation of Constitutional rights, notwithstanding state sovereign immunity, so long as the remedy sought is prospective. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 n.10 (1989). The distinction between suits for damages, against which state employees enjoy varying levels of immunity, and suits for injunction and other equitable relief are "commonplace in immunity doctrine." *Id.* (*citing* L. Tribe, American Constitutional Law § 3-27, p.190 n.3 (2d ed. 1988)); *see also Ex parte Young*, 209 U.S. 123, 159-60 (1908).

Texas state law is consistent with federal immunity law in this regard. Unlike suits for monetary damages, suits against the State of Texas, its agencies, or its employees (in their official capacities) seeking an injunction are permitted without the state's consent. *Federal Sign v. Texas Southern Univ.*, 951 S.W.2d 401, 404 (Tex. 1997); *Texas State Employees Union v. Texas Workforce Commission*, 16 S.W.3d 61, 67 (Tex. App. - Austin 2000). The bar of sovereign immunity applies only where monetary damages are sought. *See Texas State Employees Union*, 16 S.W.3d at 67.

It cannot be reasonable or appropriate to require a showing of actual malice before an injunction can lie against a voluntary medical association, when no such requirement is imposed to protect state employees under federal or state immunity law.

2. It is Unreasonable and Unnecessary to Require a Showing of Actual Malice in Breach of Contract Actions.

The policy goal of encouraging doctors to review the actions of doctors, and to protect the individuals and organizations involved in those proceedings, is not served by requiring actual malice to be shown before the terms of a contract can be enforced. In fact, the malice requirement is counterproductive. By undermining the assurances of fairness and good faith contained in the bylaws and constitution of the DCMS, the TMA, and similar organizations, the amended Act insures that fewer doctors will be willing to join or remain as members of such organizations.

The DCMS and other voluntary medical associations can only review the actions of physicians who volunteer to become and who remain members. By removing the realistic possibility of judicial enforcement of contractual promises of fairness and good faith, the amended Act makes it less likely doctors will join such a medical association, and more likely members will leave before they too are subject to proceedings that do not comply with fundamental due process. The jury found that the DCMS did not conduct Dr. Ubiñas' disciplinary proceeding with the fairness and good faith he was due. Doctors who hear about how Dr. Ubiñas was treated by the DCMS are not likely to place their trust and their careers in its hands or the hands of similar organizations.

It is not necessary for the state to impose a malice standard on breach of contract actions. The DCMS, the TMA and similar organizations, like any party to a contract, are free to negotiate their level of contractual obligations in

advance. Parties who sense they are exposed to more than an ideal level of liability can simply contract for less liability. There is no better example of this fact than the TMA's own decision, following the institution of the lawsuit in this matter, to remove the promises of fairness and good faith from its Hearing Procedures Manual. (4 SF 408:5-409:14).

II. By Depriving Dr. Ubiñas of a Fair Disciplinary Proceeding, the DCMS Has Denied Him Due Process in Violation of the Fourteenth Amendment.

The DCMS and TMA have deprived Dr. Ubiñas of his property interest in a fair disciplinary proceeding with due process. The DCMS and TMA violated Dr. Ubiñas' right to Due Process by depriving him of his property interests as defined by their contractual relationship.

The Texas immunity statute as interpreted by the Texas Court of Appeals abrogated Dr. Ubiñas' contractual right to a fair and good faith disciplinary proceeding, a property interest protected by the Constitution. The DCMS and TMA qualify as state actors for purposes of the Due Process Clause.

The prerequisites for review under the Due Process Clause are: (1) conduct by a state actor, (2) that violates a constitutionally protected property interest, and (3) without due process. *See Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538-45 (1984). The DCMS's conduct in Dr. Ubiñas' case satisfies the prerequisites for review under the Due Process Clause.

A. The DCMS and TMA Constitute State Actors For Purposes of the Disciplinary Proceeding in This Case.

The DCMS and TMA qualify as state actors under the Due Process Clause. While the Fourteenth Amendment "erects no shield against merely private conduct," *Shelley v. Kramer*, 334 U.S. 1, 13 (1948), courts have failed to reach a consensus on when an ostensibly private actor's conduct should be treated as though it were the conduct of the state. *See, e.g., Goussis v. Kimball*, 813 F. Supp. 352, 356 (E.D. Pa. 1993) ("At least three relevant approaches are suggested by Supreme Court jurisprudence.").

One approach, derived from *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150-52 (1970), would treat an otherwise private entity as a state actor if it acts in concert with, with the assistance of, or at the direction of the state. *See Barber v. Dale County Mental Health Center*, 898 F. Supp. 832, 836 (M.D. Ala. 1995). Another approach, suggested by *Blum v. Yaretsky*, 457 U.S. at 1005, places otherwise private conduct within the reach of the Due Process Clause if the actor exercises powers that are ordinarily reserved to the sovereign. *See Barber*, 898 F. Supp. at 835.

Under either of these theories, the DCMS and TMA are state actors for purposes of the Due Process Clause. First, the physician disciplinary proceedings they conduct operate with the assistance of nearly complete immunity from legal liability. The State of Texas has cloaked the DCMS with immunity from even injunctive relief arising from disciplinary proceedings, which the Texas Court of Appeals below found was designed to assist in the disciplinary process by protecting individuals and organizations involved. Second, immunities of this sort are ordinarily exclusively reserved to the sovereign.

We acknowledge, however, that other theories are applied by federal courts under which the DCMS and TMA would be less likely to qualify as state actors. For example, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724-25 (1961) suggests that state actor status should be reserved for entities conducting business as joint participants with the state. *See Barber*, 898 F. Supp. at 836. Yet another theory is suggested by *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), where the inquiry rested on whether there was a close nexus between the particular conduct in question and the state. *See Goussis*, 813 F. Supp. at 356-57.

Faced with the uncertain state of this important area of law, many courts have resorted to applying a laundry list of tests and theories in order to reach a patchwork result. *See Barber*, 898 F. Supp. at 835-36 (discussing alternative theories); *see also Cole v. Huntsville Memorial Hospital*, 920 S.W.2d 364, 368-69 (Tex. App. - Houston [1st Dist.] 1996) (listing theories and factors used by the Fifth Circuit), *cert. denied*, 520 U.S. 1143 (1997).

Thus, under at least some of the tests developed for determining who is a state actor, but perhaps not under all, the DCMS and TMA are state actors. The Court should clarify the requirements for an entity to be a state actor for purposes of the Due Process Clause and find that the DCMS and TMA are state actors.

B. Dr. Ubiñas' Contract Right to a Fair and Good Faith Disciplinary Proceeding Is a Constitutionally Protected Property Interest.

Dr. Ubiñas contends that his contract right to a fair disciplinary process, conducted in good faith, is a constitutionally protected property interest for the purposes of the Due Process Clause. The Fourteenth Amendment to the United States Constitution guarantees that no State "shall deprive any person of life, liberty, or property, without due process of law." U.S. CONST. 14th Amendment. Due Process guards "the security of interests that a person has already acquired in specific benefits." *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972). Federal courts are divided on how to approach the question of when a contract right is also a property right protected by the Due Process Clause. *See Blackwell v. The Mayor and Commissioners of Delmar*, 841 F. Supp. 151, 155 (D. Md. 1993) ("courts have encountered substantial difficulty differentiating the types of contract rights that are also property rights.").

The Second and Third Circuits have identified two types of contracts that confer property rights for purposes of the Due Process Clause: (1) contracts that confer a status that is characterized by dependence or permanence, and (2) contracts that themselves provide that termination may only be for cause. *See Unger v. National Residents Matching Program*, 928 F.2d 1392, 1399 (3d Cir. 1991); *S&D Maintenance Co. Inc. v. Goldin*, 844 F.2d 962 (2d Cir. 1988); *see also Blackwell*, 841 F. Supp. at 155 (following *S&D Maintenance*).

Under the approach adopted by the Second and Third Circuits, Dr. Ubiñas' contract right to a fair and good faith disciplinary proceeding is a constitutionally protected property right. His contract with DCMS conferred on him the status of

member, a status that could only be revoked upon specific findings of wrongdoing. *See* TMA Hearing Procedures Manual 7(a).

We recognize, however, that the Seventh Circuit has adopted what amounts to a per se rule that a contract right to specified procedures does not amount to a constitutionally protected property interest. *See Jit Kim Lim v. Central Dupage Hosp.*, 871 F.2d 644, 648 (1989). Under the Seventh Circuit's approach, Dr. Ubiñas would not have a constitutionally protected property right. The Court should grant certiorari to resolve the conflict in the circuits.

C. The Procedures Employed by the DCMS and TMA Were Constitutionally Inadequate.

The procedures and rulings in Dr. Ubiñas' case deprived him of the Due Process required by the Fourteenth Amendment. When it is shown that a state actor has deprived a party of a protected property interest, "the question remains what process is due." *Cleveland Board of Ed.*, 470 U.S. at 542. To answer that question, the Court balances the competing interests at stake, including the private interest in retaining the property, the governmental interest, and the risk of erroneous deprivation. *See Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

In this case, Dr. Ubiñas' interest in retaining his right to a fair disciplinary proceeding cannot be overstated. Dr. Ubiñas' medical practice essentially hangs in the balance. (3 SF 221:3-18). Moreover, it has already been determined by a jury that the high risk of erroneous deprivation has become a reality in this case.

The DCMS's conclusion that Dr. Ubiñas violated the American Medical Society Principles of Medical Ethics was

reached against the great weight of the evidence. The DCMS disciplinary board failed to credit evidence presented by its own expert witnesses and hospital records and its findings were inconsistent with the evidence presented. Instead, the DCMS relied on information later shown to have been erroneous and provided to it in bad faith by a physician with whom Dr. Ubiñas had an acrimonious relationship. Physicians who investigated the charges against Dr. Ubiñas later sat on the committees hearing the evidence, in derogation of the fundamental requirement that there be an impartial hearing. The only medical ethics expert in the TMA, whose job is normally to provide advice on ethics to the committee that sat in judgment of Dr. Ubiñas, switched roles and argued the case against him before the very same committee he advises. That same attorney was present when the DCMS deliberated on its original decision to discipline Dr. Ubiñas, and in fact drafted the decision expelling him. In short, the DCMS and TMA reached the decision to expel Dr. Ubiñas arbitrarily, and under the undue influence of investigators turned judges and an advisor turned advocate. These serious shortcomings led the jury to find that the DCMS and TMA failed to provide Dr. Ubiñas with the fairness and good faith he was due.

The governmental interest in expelling Dr. Ubiñas from the DCMS is minimal. None of the three complaints at the root of this case ever alleged that Dr. Ubiñas' conduct put a patient at risk. In fact, the patients who originated the complaints against him all had excellent surgical results. Moreover, the cost of eliminating the multiple defects in the disciplinary process would not be unreasonable in light of the benefits those improvements would return for the medical profession and the public at large. Accordingly, the balance of competing interests weighs strongly in Dr. Ubiñas' favor and there is a serious risk of erroneous deprivation.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for certiorari in this case and reverse the decision of the Texas Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS AT DALLAS DATED FEBRUARY 7, 2001

IN THE
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-97-00027-CV

DALLAS COUNTY MEDICAL SOCIETY and TEXAS MEDICAL ASSOCIATION,

Appellants,

V.

EMMANUEL E. UBIÑAS-BRACHE, M.D.,

Appellee.

On Appeal from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 94-11112-B

OPINION

Before Chief Justice Thomas and
Justices Wright and Rosenberg[1]
Opinion By Justice Rosenberg

This case involves a dispute over the membership of Dr. Emmanuel E. Ubiñas-Brache (Ubiñas) in the Dallas County

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1. The Honorable Barbara Rosenberg, Former Justice, Court of Appeals, Fifth District of Texas at Dallas, sitting by assignment.

Medical Society (DCMS). The DCMS expelled Ubiñas. He appealed the expulsion through the appeals process of the Texas Medical Association (TMA). After adverse rulings, he brought this action in district court on the basis of a violation of due process and breach of agreement. After a jury trial challenging the actions of the DCMS and the TMA, the trial court entered judgment on the findings that the DCMS was enjoined from expelling Ubiñas on the issues raised in the complaints that led to the expulsion. In sixteen points of error, the DCMS and TMA appeal the judgment, alleging it was entered erroneously because they were entitled to medical peer review immunity under the Medical Practice Act[2] (the Act); the defenses of estoppel and waiver were proved; the evidence was legally and factually insufficient to support the jury's findings; the trial court improperly excluded their evidence; and the trial court improperly granted an injunction and failed to award attorney's fees. Ubiñas brings two cross-points regarding his entitlement to attorney's fees. Concluding that this suit is barred by medical peer review immunity, we reverse the trial court's judgment and render judgment against Ubiñas on his medical peer review complaints. We remand for further proceedings regarding the requests for attorney's fees.

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2. When these proceedings took place in the trial court, the Medical Practice Act was contained in article 4495b of the Revised Civil Statutes of Texas. Effective September 1, 1999, that article was repealed and recodified in the Texas Occupations Code. *See* Act of Act of June 1, 1987, 70th Leg., R.S., ch. 596, § 18, 1987 Tex. Gen. Laws 2325, 2335, *repealed by* Act of May 13, 1999, 76th Leg., R.S., ch. 388, § 6a, 1999 Tex. Gen. Laws 1431, 2440 (current version at TEX. OCC. CODE ANN. § 160.010 (Vernon 2001)). In this opinion, we refer to article 4495b as it existed when the trial court made its decision.

Appendix A

FACTS AND PROCEDURAL BACKGROUND

In 1984, Ubiñas, a Dallas county physician specializing in craniofacial and plastic and reconstructive surgery, joined the DCMS. The DCMS is a private, nonprofit organization of physicians that is dedicated to the promotion and maintenance of high standards of ethical and medical practice. The DCMS is a chartered member of the TMA. Membership in the DCMS is voluntary. Each member must subscribe to the American Medical Association's principles of medical ethics and agree to be bound by the DCMS disciplinary procedures. The DCMS also provides mechanisms to resolve patient complaints against DCMS members.

In May 1991, Sharon Fleming filed a complaint with the DCMS regarding Ubiñas's surgical treatment of her broken finger. Her complaint was forwarded to the Mediations Committee, which referred it to the Fee Dispute Committee. That committee conducted an investigation through a member, Dr. Paul Pin. Then, in September 1991, the complaint was forwarded to the Board of Censors.

In February 1992, while the Board of Censors was still reviewing Fleming's complaint, the DCMS received a second complaint against Ubiñas about his treatment of Kevin Fair. On Fair's behalf, Dr. Michael Maris, a family friend, filed a complaint alleging an outrageously high bill for minor injuries. Because the Fleming complaint was pending and this second complaint was made by a physician, it was referred to the Board of Censors.

In May 1992, the Board of Censors scheduled a closed-door meeting with Ubiñas. Before the meeting, a third

complaint was filed against Ubiñas by a patient, Dewayne Randle, who complained about the high amount of the bill for the surgical repair of his lacerated finger. Because of the other complaints, Randle's complaint was referred to the Board of Censors.

Ubiñas received notice of all the complaints and responded to them. He agreed to reduce Randle's bill, claiming a billing error. At the closed-door meeting, Ubiñas and the Board of Censors discussed all three complaints. After the meeting, the Board wrote a letter to Ubiñas outlining concerns and asking him to respond in writing. The Board then engaged experts as consultants.

In December 1992, after reviewing the experts' reports, Ubiñas's response, and other documentation, the Board of Censors issued a report recommending that Ubiñas be expelled from the DCMS and the TMA. In the report, the Board made findings that Ubiñas acted unethically in that he:

(1) failed to deal honestly with all three patients, by providing services that were unnecessary and inconsistent with the clinical findings; and

(2) engaged in deceptive practices by providing all three patients with unnecessary services, resulting in "over treatment" and unnecessary charges.

At Ubiñas's request, the Board of Directors held a ten-hour hearing in which expert evidence was presented, witnesses examined and cross-examined, and attorneys'

arguments were made. After Ubiñas submitted his written closing statement, the Board of Directors met in executive session. The Board voted to expel Ubiñas from the DCMS and issued a disciplinary order. The order contained the findings that included the following:

- the repair of one of Fleming's ligaments was considered of questionable value, and charging for the repair would not likely be considered usual and customary.

- it was unnecessary to repair a nerve and an artery in Fair's thumb, and such repairs constituted "over treatment" that is not usual and customary.

- there was no evidence of damage to a nerve and an artery in Randle's finger, there was no evidence that Dr. Ubiñas actually performed repairs on those structures, and unnecessary charging was a deceptive practice.

Ubiñas then appealed to the TMA Board of Councilors. After hearing oral argument and receiving briefs submitted by Ubiñas and DCMS, the Board of Councilors affirmed the expulsion. Ubiñas next appealed to the American Medical Society's Council on Ethical and Judicial Affairs, which affirmed the expulsion.

After the medical organizations' adverse decisions, Ubiñas filed this suit in district court. Ubiñas alleged that he had been denied due process under the disciplinary procedures of the DCMS as set out in the TMA's Hearings Procedures Manual, as well as procedural due process

guaranteed by the Texas Constitution, and that his contract with the association was breached. Specifically, his due process claims were that the manual had no prescribed burden of proof, the proceedings were not confidential, and the findings of the DCMS were contrary to the evidence. His breach of contract claim was that the disciplinary proceedings were not conducted as the manual provided. The breach of contract claim involved the same factual issues as the due process claims. Ubiñas sought an injunction only. He claimed that, absent the injunction, he would suffer irreparable harm because the expulsion would result in disciplinary action by the Texas State Board of Medical Examiners, loss of hospital staff privileges, and probable inability to obtain medical malpractice insurance. The DCMS and the TMA answered, claiming that there was no cause of action for the facts alleged and that the medical associations were immune from suit and damages under the federal and state medical practice acts. The case was tried to a jury. The trial court refused to charge the jury under the Act requiring a finding of malice for a suit against a medical peer review committee. The trial court's charge for liability was presented and answered as follows:

> Did any of those named below fail to provide Dr. Ubiñas, a member subject to disciplinary action, with fundamental fairness and a fair and good faith proceeding?
>
> Answer "Yes" or "No" as to each of the following:
>
> a. Dallas County Medical Society */Yes/*
>
> b. Texas Medical Association */Yes/*

The jury also found that the DCMS's and the TMA's failure to provide fundamental fairness and a fair and good faith proceeding caused Ubiñas irreparable harm. The trial court entered judgment in accordance with the jury verdict, enjoining the DCMS from expelling Ubiñas from the DCMS. The DCMS and the TMA appeal the trial court's judgment.

MEDICAL PEER REVIEW IMMUNITY

In the sixth point of error, appellants contend that the trial court failed to rule as a matter of law that the DCMS and the TMA are immune from suit under sections 5.06(*l*) and (m) of the Act. Ubiñas responds that appellants did not plead section 5.06(*l*), the proceeding did not qualify as a medical peer review action, section 5.06(m) does not preclude an action for injunctive relief, and the exercise of immunity would deny Ubiñas constitutional rights.

Pleading Immunity From Suit

Appellants did not plead in their answer section 5.06(*l*) of the Act, which is the specific section that provides immunity from causes of action. *See* Former TEX. REV. CIV. STAT. ANN. arts 4495b, § 5.06(*l*).[3] However, they did assert other immunity provisions under the Act and asserted that Ubiñas had failed to state a cause of action under Texas law. Generally, an affirmative defense is waived if it is not pleaded. TEX. R. CIV. P. 94. Though not specifically

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3. *See* Act of Act of June 1, 1987, 70th Leg., R.S., ch. 596, § 18, 1987 Tex. Gen. Laws 2325, 2335 (repealed 1999) (current version at TEX. OCC. CODE ANN. § 160.010 (Vernon 2001)).

mentioned in rule 94, immunity is an affirmative defense that ordinarily must be pleaded to avoid waiver. *See, e.g.*, *Davis v. City of San Antonio*, 752 S.W.2d 518, 519-20 (Tex. 1988) (governmental immunity). However, the Texas Supreme Court concluded that the defense of immunity is not waived by the failure to specifically plead it if it is apparent on the face of the petition and established as a matter of law. *Shoemake v. Fogel, Ltd.*, 826 S.W.2d 933, 937 (Tex. 1992) (citing *Phillips v. Phillips*, 820 S.W.2d 785, 789-90 (Tex. 1991)). Thus, rule 94's requirement of pleading is not absolute. *Shoemake*, 826 S.W.2d at 937. Here, the defensive pleadings raise immunity for medical peer review and state that there is no cause of action for Ubiñas's claims. Therefore, appellants did not waive the immunity defense.

Medical Peer Review Action

A health care entity that is covered under the Act is "a professional society or association, or committee thereof, of physicians that follows a formal peer review process for the purpose of furthering quality medical or health care." Former TEX. REV. CIV. STAT. ANN. art. 4495b, § 1.03(a)(5).[4] For a professional society's committee to qualify as a medical peer review or professional review committee, it must be a committee or the governing board of the society that operates under written by-laws, approved by the society's policy-making body or the governing board, and is authorized to evaluate the quality of medical and health care services or

4. Act of June 1, 1987, 70th Leg., R.S., ch. 596, § 1, 1987 Tex. Gen. Laws 2325, 2325 (repealed 1999) (current version at TEX. OCC. CODE ANN. § 151.002(a)(5)(C) (Vernon 2001)).

competence of the physician. *Id.* § 1.03(a)(6).[5] The peer review action that is protected under the Act is "the evaluation of medical and health-care services, including evaluation of the qualifications of professional health-care practitioners and of patient care rendered by those practitioners." *Id.* § 1.03(a)(9).[6] A peer review includes "the evaluation of the merits of complaints relating to health care practitioners and determinations or recommendations concerning those complaints." *Id.*

Here, the DCMS and the TMA are professional associations and thus meet the definition of health care entities under the Act. The evidence is undisputed that these organizations established peer review committees and operating procedures for those committees by written by-laws properly adopted by the organizations and that those peer review committees reviewed the complaints against Ubiñas. The uncontroverted evidence is that the DCMS Board of Directors reviewed patient care complaints against Ubiñas. To controvert the fact that this was a peer review action subject to the Act, Ubiñas claims the evidence demonstrates that the committee did not follow its own operating rules and provide due process and a fair hearing. The Act, however, does not provide that the operating procedures must be strictly followed, only that procedures are written and properly

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5. Act of June 1, 1987, 70th Leg., R.S., ch. 596, § 1, 1987 Tex. Gen. Laws, 2325, 2325 (repealed 1999) (current version at TEX. OCC. CODE ANN. § 151.002(a)(8)).

6. Act of June 1, 1987, 70th Leg., R.S., ch. 596, § 1, 1987 Tex. Gen. Laws, 2325, 2326 (repealed 1999) (current version at TEX. OCC. CODE ANN. § 151.002(a)(7)).

adopted for a peer-review action. Thus, the DCMS and the TMA established the action as a medical peer review determination covered by the Act.

Immunity from Injunction

The Act provides for two types of immunity. The first is immunity from a cause of action. Section 5.06(*l*) provides that:

> A cause of action does not accrue against . . . the health-care entity from any act, statement, determination or recommendation made, or act reported, without malice, in the course of peer review as defined by this Act.

Id. § 5.06(*l*).[7] The second is immunity from civil liability.[8] Section 5.06(m) provides:

> A person, health-care entity, or medical peer review committee, that, without malice, participates in medical peer review activity or furnishes records, information, or assistance to a medical

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7. Act of Act of June 1, 1987, 70th Leg., R.S., ch. 596, § 18, 1987 Tex. Gen. Laws 2325, 2335 (repealed 1999) (current version at TEX. OCC. CODE ANN. § 160.010(b)).

8. Ubiñas claims that the section providing relief from civil liability does not apply to injunctions that were requested in this case. Nevertheless, damages and injunctions are both considered civil liability. *See Tex. Dep't of Transp. v. Ramming*, 861 S.W.2d 460, 468 (Tex. App. — Houston [14th Dist.] 1993, writ denied).

> peer review committee or the board is immune from any civil liability arising from such act.

Id. § 5.06(m).[9]

Urbiñas argues that the immunity provisions do not apply because he did not request damages. That argument is without merit. First, section 5.01(*l*) provides immunity for causes of action. This provision is not limited by the type of remedy requested. Second, section 5.06(m) provides immunity from civil liability. Civil liability includes injunctions as well as damages. *See Tex. Dep't of Transp.*, 861 S.W.2d at 468 (explaining statute may specifically limit liability to damages, thus excluding injunctive relief). Therefore, the immunity provisions can be invoked regardless of the remedy sought in a lawsuit.

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9. Act of Act of June 1, 1987, 70th Leg., R.S., ch. 596, § 18, 1987 Tex. Gen. Laws 2325, 2335 (repealed 1999) (current version at TEX. OCC. CODE ANN. § 160.010(a)(2)). The recodified section provides immunity from civil liability for:

> a member, employee, or agent of the board, a medical peer review committee, or a medical organization committee, or a medical organization district or local intervenor, who takes an action or makes a recommendation within the scope of the functions of the board, committee, or intervenor program, if that member, employee, agent, or intervenor acts without malice and in the reasonable belief that the action or recommendation is warranted by the facts known to that person; . . . .

TEX. OCC. CODE ANN. § 160.010(a)(2)).

Appendix A

Proof of Malice

Under the Act, there is a threshold standard of malice to state a cause of action against a health care entity for medical peer review actions. *See St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 509 (Tex. 1997). Accordingly, for Ubiñas to establish that he was entitled to relief, he had the burden to establish malice on the part of the DCMS and the TMA. Malice requires knowledge that the allegation is false or reckless disregard for whether the allegation is false. *Maewal v. Adventist Health Sys./Sunbelt, Inc.*, 868 S.W.2d 886, 893 (Tex. App. — Fort Worth 1993, writ denied).

Ubiñas did not plead malice in the DCMS and TMA peer review process. Neither organization excepted to the pleadings. The DCMS and the TMA offered a jury issue that asked for a finding on whether the DCMS or the TMA acted with malice. The trial court refused to submit the issue. Ubiñas did not offer such an issue. Ubiñas had the burden to prove malice to meet the threshold to establish a cause of action for, or to impose, civil liability. *See Agbor*, 952 S.W.2d at 509. Ubiñas had the duty to see that all essential elements entitling him to a cause of action were submitted to the jury. *Walker v. Comdata Network, Inc.*, 730 S.W.2d 769, 771 (Tex. App. — Dallas 1987), *dism'd*, 741 S.W.2d 927 (Tex. 1988); *Cameron County v. Valasquez*, 668 S.W.2d 776, 781 (Tex. App. — Corpus Christi 1984, writ ref'd n.r.e.) (op. on reh'g); *see* TEX. R. CIV. P. 279. To impose liability under the Act required an affirmative finding on the issue of malice. When, as here, the plaintiff fails to request an issue, and an affirmative finding upon such omitted issue is essential to recovery, the trial court must render judgment for the

defendant. *Walker*, 730 S.W.2d at 771; *Cameron County*, 668 S.W.2d at 781 (quoting *Bueno v. Globe Indem. Co.*, 441 S.W.2d 643, 648 (Tex. Civ. App. — Corpus Christi 1969, no writ)). Therefore, Ubiñas waived recovery by failing to request a finding on malice. *See* TEX. R. CIV. P. 279; *Emerald Forest Util. Dist. v. Simonsen Constr. Co.*, 679 S.W.2d 51, 54 (Tex. App. — Houston [14th Dist.] 1984, writ ref'd n.r.e.).

Open Courts Provision of the Texas Constitution

Ubiñas argues that enforcing the immunity provision unless he can prove malice would violate the open courts provision of the Texas Constitution. *See* TEX. CONST. art. I, § 13. This provision states: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." *Id.* The open courts provision affords three distinct protections. First, courts must actually be open and operating. *See Runge & Co. v. Wyatt*, 25 Tex. Supp. 291, 294 (1860). Second, citizens must have access to the courts unimpeded by unreasonable financial barriers. *See LeCroy v. Hanlon*, 713 S.W.2d 335, 342 (Tex. 1986). Third, because our law must afford meaningful legal remedies to our citizens, the legislature may not abrogate the right to assert a well-established common law cause of action. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 448 (Tex. 1993); *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355-57 (Tex. 1990). The open courts provision "applies only to statutory restrictions of a cognizable common law cause of action." *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 499 (Tex. 1995); *Moreno*, 787 S.W.2d at 355-56. Ubiñas complains about only the third protection.

Appendix A

Generally, the open courts provision restricts the legislature's ability to withdraw all legal remedies from one having a cause of action well-established and well-defined in the common law. *Lebohm v. City of Galveston*, 154 Tex. 192, 195-96, 275 S.W.2d 951, 953 (1955). To demonstrate that a statute violates this constitutional guarantee, a litigant must show that, first, the statute restricts a well-recognized common law cause of action, and, second, the restriction is unreasonable or arbitrary when balanced against the purpose of the statute. *Agbor*, 952 S.W.2d at 508 (citing *Baptist Mem'l Hosp. Sys. v. Arredondo*, 922 S.W.2d 120, 121 (Tex. 1996); *Moreno*, 787 S.W.2d at 355)).

First, although Ubiñas has couched this as a breach of contract claim, it is an action concerning a private association's decision-making powers regarding its membership. Traditionally, courts are not disposed to interfere with the internal management of a voluntary association. *Dickey v. Club Corp. of Am.*, 12 S.W.3d 172, 176 (Tex. App. – Dallas 2000, pet. denied) (citing *Harden v. Colonial Co[illegible]ry Club*, 634 S.W.2d 56, 59 (Tex. App. — Fort Worth [illegible], writ ref'd n.r.e.)). By becoming a member, a person subjects himself, within legal limits, to the organization's power to make and administer its rules. *Dickey*, 12 S.W.3d at 176; *Harden*, 634 S.W.2d at 59. A private, nonprofit organization has the right to manage, within legal limits, its own affairs without interference from the courts. *Dickey*, 12 S.W.3d at 176; *Butler v. Hide-A-Way Lake Club, Inc.*, 730 S.W.2d 405, 410 (Tex. App. — Eastland 1987, writ ref'd n.r.e.); *Harden*, 634 S.W.2d at 59; *Combs v. Tex. State Teachers Ass'n*, 533 S.W.2d 911, 913 (Tex. Civ. App. — Austin 1976, writ ref'd n.r.e.). As long as a governing body does not decide a dispute by

legislating a resolution instead of exercising judicial-type interpretation, does not transgress the bounds of reason, or contravene public policy, the courts cannot interfere. *Dickey*, 12 S.W.3d at 176; *Butler*, 730 S.W.2d at 410; *Harden*, 634 S.W.2d at 59. Thus, judicial review is proper only when the actions of the organization are illegal, against some public policy, or are arbitrary or capricious. *Dickey*, 12 S.W.3d at 176; *Butler*, 730 S.W.2d at 410; *Harden*, 634 S.W.2d at 60.

Accordingly, a review of a private association's actions are severely limited under the common law in Texas. Courts have gone so far as to state that they will not review a private association's failure to conduct its business according to its own procedures except for the purpose of protecting some civil or property right. *Brotherhood of R.R. Trainmen v. Price*, 108 S.W.2d 239, 241 (Tex. Civ. App. — Galveston 1937, writ dism'd w.o.j.); *Gaines v. Farmer*, 55 Tex. Civ. App. 601, 119 S.W. 874, 877 (Tex. Civ. App. 1909, writ dism'd w.o.j.). In discussing the review of membership in a voluntary association, the Texas Supreme Court has stated:

> A member of a voluntary association is bound by a sentence of expulsion against him lawfully rendered by a tribunal created in pursuance of its constitution, and clothed with that power. The rule also applies at least to such incorporated societies as are not organized principally for commercial gain. By uniting with the society, the member assents to and accepts the constitution, and impliedly binds himself to abide by the decision of such boards as that instrument may provide, for the determination of disputes arising within

> the association. The decisions of these tribunals, when organized under the constitution, and lawfully exercising these powers, though they involve the expulsion of a member, are no more subject to collateral attack for mere error than are the judgments of a court [of] law. But if the tribunal act illegally; if it declare a sentence of expulsion for an offense for which that penalty is not provided by the constitution and laws of the association; and if there be no right of appeal, within the association, reserved for the redress of the injury, — the courts will review the proceedings, and, if found illegal, will treat them as null, and restore the member to his privileges as such. . . . If his expulsion was illegal, and if the association had refused, upon appeal, to set it aside, it may be that this court would have granted redress.

Screwmen's Benevolent Ass'n v. Benson, 76 Tex. 552, 555, 13 S.W. 379, 380 (1890). Additionally, in a situation analogous to membership in a medical society, Texas cases have consistently held that the decisions of a governing board of a private hospital with regard to staff privileges are not subject to judicial review. *See Winston v. Am. Med. Int'l, Inc.*, 930 S.W.2d 945, 956 (Tex. App. — Houston [1st Dist.] 1996, writ denied); *Armintor v. Cmty. Hosp. of Brazosport*, 659 S.W.2d 86, 88-89 (Tex. App. — Houston [14th Dist.] 1983, no writ); *Tigua Gen. Hosp., Inc. v. Feuerberg*, 645 S.W.2d 575, 578 (Tex. App. — El Paso 1982, writ dism'd w.o.j.); *Hodges v. Arlington Neuropsychiatric Ctr., Inc.*, 628 S.W.2d 536, 538 (Tex. App. — Fort Worth 1982, writ ref'd n.r.e.);

Charter Med. Corp. v. Miller, 605 S.W.2d 943, 951 (Tex. Civ. App. — Dallas 1980, writ ref'd n.r.e.); *see also Grossling v. Ford Mem'l Hosp.*, 614 F. Supp. 1051, 1058 (E.D. Tex. 1985). These cases have held that a physician in this State has no cause of action against a private hospital for the termination of staff privileges, even when the action of the hospital was arbitrary and capricious or where common law rights to procedural or substantive due process were violated. *Tigua Gen. Hosp., Inc.*, 645 S.W.2d at 578; *Hodges*, 628 S.W.2d at 538-539; *Charter Med. Corp.*, 605 S.W.2d at 951.

We conclude that a breach of contract action to maintain membership in a private association is not a well-recognized or well-defined common law action in this state because of the doctrine of judicial non-intervention. *See Dickey*, 12 S.W.3d at 176-77; *Brotherhood of R.R. Trainmen*, 108 S.W.2d at 241. For Ubiñas to show this doctrine does not apply and maintain an action against a private association under the common law, he must meet a substantial threshold by showing that the organization's actions were illegal, involved some civil or property right, were against public policy, or were arbitrary or capricious. *Dickey*, 12 S.W.3d at 176; *Butler*, 730 S.W.2d at 410; *Harden*, 634 S.W.2d at 60. Thus, the requirements for judicial review are more than a mere breach of its own policies. Significantly, Ubiñas's allegations are merely that the decision made by DCMS and TMA constituted a breach of contract and violated his due process rights. Thus, the common law does not provide a well-recognized remedy for the claims Ubiñas alleged.

We have observed that the threshold standards for bringing any recognized common law suit against a voluntary

private association are substantial. However, the legislature has provided a different threshold standard, i.e., malice, for contesting the actions of private associations involved in medical peer review. Legislation violates article I, section 13 of the Texas Constitution and is a denial of due process if its effect is to unreasonably abrogate a recognized right of recovery without substituting other reasonable remedies. *Weibel v. Martin Indus., Inc.*, 806 S.W.2d 345, 346 (Tex. App. — Fort Worth 1991, writ denied). The substitution of malice in the case of medical peer review is reasonable in light of the other hurdles presented by the common law in pursuing actions concerning membership against a private voluntary association. The malice threshold promotes the public policy of having physicians review the actions of physicians and affording some protections for the organizations and the participants in those proceedings. Because we conclude that establishing a threshold standard of malice for reviewing a medical peer review proceeding is a reasonable substitute for the thresholds provided in Texas law for suit against a voluntary association for expulsion from membership, we hold this standard does not violate the open courts provision of the Texas Constitution.

Accordingly, we sustain appellants' sixth point of error and reverse the trial court's judgment and render judgment against Ubiñas on his medical peer review complaints. Because our resolution of this point of error grants medical peer review immunity to the DCMS and the TMA for Ubiñas's claims, we need not address appellants' first through fifth and seventh through twelfth points of error.

Appendix A

ATTORNEY'S FEES

DCMS and TMA

In points of error thirteen through seventeen, appellants complain that the trial court erred in failing to award them attorney's fees. Specifically, in their seventeenth point of error, appellants contend the trial court erred by failing to submit a question inquiring whether Ubiñas's lawsuit was frivolous, unreasonable, without foundation, or brought in bad faith.

The DCMS and the TMA filed a counterclaim to recover attorney's fees under the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C.A. § 11113 (West 1995), and section 5.06(p) of the Act, former TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.06(p).[10] During the trial, the parties agreed to submit the amount of fees to the court. Appellants requested jury questions on the predicates to the award of fees. The court refused the submission. After the jury returned a verdict for Ubiñas, the trial court entered a judgment denying attorney's fees to the DCMS and the TMA as well as to Ubiñas.

An award of attorney's fees to the prevailing party is not mandatory under the HCQIA. *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 641-42 (3rd Cir. 1996). The HCQIA provides that a substantially prevailing defendant "shall" recover attorney's fees if the defendant has met certain

10. Act of June 1, 1987, 70th Leg., R.S., ch. 596, § 18, 1987 Tex. Gen. Laws 2325, 2335 (repealed 1999) (current version at TEX. OCC. CODE ANN. § 160.008(c) (Vernon 2001)).

standards established by the section 11112(a)[11] and if the claim or the plaintiff's conduct during the litigation of the claim "was frivolous, unreasonable, without foundation, or in bad faith." 42 U.S.C.A. § 11113. Whether a review action meets these standards is a fact issue. *See id.* § 11112(a); *Bryan*, 33 F.3d at 1323. Whether to award attorney's fees pursuant to section 11113 is a determination committed to the trial court's discretion. *Addis v. Holy Cross Health Sys. Corp.*, 88 F.3d 482, 486 (7th Cir. 1996); *Muzquiz v. W.A. Foote Mem'l Hosp., Inc.*, 70 F.3d 422, 431-32 (6th Cir. 1995).

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11. Section 11112(a) provides, as a standard, that a professional review action must be taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C.A. § 11112(a). Section 11112(b) provides "safe harbor" procedures that satisfy the adequate notice and hearing requirement of subsection 11112(a)(3). *Id.* § 11112(b); *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1323 (11th Cir. 1994).

to recover attorney's fees "if the plaintiff's original action is determined to be frivolous or brought in bad faith." Former TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.06(p).[12] Generally, bad faith is a question of fact. *See O'Shea v. Int'l Bus. Machs. Corp.*, 578 S.W.2d 844, 848 (Tex. Civ. App. — Houston 1st Dist.] 1979, writ ref'd n.r.e.).

Because we have reversed the trial court's judgment and rendered judgment against Ubiñas on his complaints, the DCMS and the TMA are now the prevailing parties under the HCQIA, and they filed a counterclaim for attorney's fees as permitted by the Act. Whether the DCMS and the TMA are entitled to attorney's fees under either the HCQIA or the Act requires factual determinations. Because the DCMS and the TMA submitted proposed jury questions on the factual predicates for attorney's fees, we conclude the trial court abused its discretion by failing to submit the questions, and we sustain appellants' seventeenth point of error. Because of our disposition of this point, we need not address points of error thirteen through sixteen. We remand to the trial court the issue of whether appellants are entitled to attorney's fees.

Ubiñas

In two cross-points, Ubiñas contends that the trial court erred or abused its discretion in denying his claim for attorney's fees pursuant to the Declaratory Judgment Act, TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1997), and by denying his requests for the court to determine the amount of those fees. Under the Declaratory Judgment Act,

12. Act of June 1, 1987, 70th Leg., R.S., ch. 596, § 18, 1987 Tex. Gen. Laws 2325, 2335 (repealed 1999) (current version at TEX. OCC. CODE ANN. § 160.008(c)).

TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1997), and by denying his requests for the court to determine the amount of those fees. Under the Declaratory Judgment Act, a trial court may award reasonable and necessary attorney's fees as are equitable and just. *Id.* "The granting or denial of attorney's fees in a declaratory judgment action is within the trial court's discretion." *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996). Because we have reversed the trial court's judgment and rendered judgment for appellants on the merits and remanded the issue of their entitlement to attorney's fees to the trial court, we also remand the issue of Ubinas's entitlement to attorney's fees pursuant to the Declaratory Judgment Act. *See id.* at 637-38. Therefore, we need not address Ubiñas's cross-points.

CONCLUSION

Having reversed the judgment of the trial court and rendered judgment against Ubiñas on his medical peer review complaints, we reinstate the DCMS's Disciplinary Order dated June 1, 1993 and the TMA's Opinion dated February 26, 1994.[13] We dissolve the injunction regarding Ubiñas's expulsion from the DCMS and the TMA and the dissemination of any report of sanctions imposed by the DCMS and the TMA with respect to the complaints and proceedings relating to Fleming, Fair, and Randle. Further, we reverse the trial court's judgment as to costs of court and the parties' claims for recovery of attorney's fees and remand those issues to the trial court for further proceedings.

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13. The judgment states the opinion is dated February 28, 1994; the record shows the opinion is dated February 26, 1994.

Appendix A

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-97-00027-CV

DALLAS COUNTY MEDICAL SOCIETY
and TEXAS MEDICAL ASSOCIATION,

Appellants

V.

EMMANUEL E. UBIÑAS-BRACHE, M.D.,

Appellee

JUDGMENT

Appeal from the 44th Judicial District Court
of Dallas County, Texas (Tr.Ct.No. 94-11112-B).

Opinion delivered by Justice Rosenberg,
Chief Justice Thomas and Justice Wright participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** that (1) the Disciplinary Order of the Dallas County Medical Society dated June 1, 1993 is reinstated and given full force and effect; (2) the Opinion of the Texas Medical Association dated February 26, 1994 is reinstated and given full force and effect; and (3) the permanent injunction regarding expulsion from the Dallas County

Medical Society and the Texas Medical Association and the dissemination of any report of sanctions imposed by the Dallas County Medical Society and the Texas Medical Association with respect to the complaints and proceedings relating to Sharon Fleming, Kevin Fair, and Dewayne Randle is dissolved. Further, the judgment of the trial court adjudging costs of court and denying appellants and appellee recovery of their respective attorney's fees is **REVERSED** and **REMANDED** to the trial court for further proceedings. It is **ORDERED** that appellants Dallas County Medical Society and Texas Medical Association recover their costs of this appeal from appellee Emmanuel E. Ubinas-Brache, M.D. The clerk of the district court is directed to release the full amount of the balance of the cash deposit in lieu of cost bond to Thompson & Knight, attorneys for appellants.

Judgment entered February 7, 2001.

s/ Barbara Rosenberg
BARBARA ROSENBERG
JUSTICE, ASSIGNED

APPENDIX B — FINAL JUDGMENT OF THE DISTRICT COURT FOR THE 44TH JUDICIAL DISTRICT, DALLAS COUNTY, TEXAS DATED OCTOBER 2, 1996

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
44TH JUDICIAL DISTRICT

CAUSE NO. 94-11112-B

EMMANUEL E. UBIÑAS-BRACHE, M.D.

VS.

DALLAS COUNTY MEDICAL SOCIETY
AND TEXAS MEDICAL ASSOCIATION

FINAL JUDGMENT

On the 9th day of April, 1996, came on to be heard the above-entitled and numbered cause. The Plaintiff, EMMANUEL E. UBIÑAS-BRACHE, M.D. (hereinafter referred to as "Plaintiff"), appeared in person and by his attorneys of record and announced ready for trial. The Defendants, the DALLAS COUNTY MEDICAL SOCIETY ("DCMS") and the TEXAS MEDICAL ASSOCIATION ("TMA") (collectively referred to as "Defendants"), appeared by their duly authorized representatives and by their attorneys of record and announced ready for trial. A jury having been previously demanded, a jury of twelve (12) qualified jurors was duly empaneled and the case proceeded to trial.

At the conclusion of the evidence, the Court submitted the questions of fact in the case to the jury. The charge of the

Court and the verdict of the jury are incorporated herein by reference for all purposes. Because it appears to the Court that the verdict of the jury was for the Plaintiff and against the Defendants, in that both the DCMS and the TMA failed to provide Plaintiff with fundamental fairness and a fair and good faith proceeding in violation of the bylaws of the DCMS and the TMA Hearing Procedures Manual, judgment should be rendered on the verdict in favor of the Plaintiff and against the Defendants.

IT IS THEREFORE ORDERED and DECREED that the Disciplinary Order of the DCMS dated June 1, 1993, expelling Plaintiff from membership in the DCMS is set aside as null and void and is of no force or effect.

The Court finds that based upon the Jury Verdict (1) the DCMS and TMA engaged in a wrongful act or actions, namely the failure to provide Plaintiff with a fair and good faith proceeding, (2) that harm to Plaintiff is imminent if he is expelled from the DCMS and/or the TMA, and such expulsion is reported or published to the Texas State Board of Medical Examiners, the National Practitioner Data Bank, the membership of DCMS and the TMA, and any other person or entity, (3) that the act of expulsion and reporting or publication of expulsion will cause irreparable injury to Plaintiff by damaging or destroying his professional reputation and his medical practice, and (4) that Plaintiff has no adequate remedy at law, in that his ability to recover damages from the Defendants for the wrong done to him is profanely limited by the application of the state and federal statutes regulating peer review.

IT IS FURTHER ORDERED that the Opinion of the TMA dated February 28, 1994, affirming the expulsion of the Plaintiff from the DCMS and expelling Plaintiff from the TMA is set aside as null and void and is of no force or effect.

In addition to the relief granted above, it appears to the Court, based upon the jury's answers to Question No. 1 and No. 2, and the Court's findings above that the relief granted above requires the restraint of certain acts prejudicial to Plaintiff, namely that Defendants should be enjoined from and ordered to refrain from, directly or indirectly, (1) expelling the Plaintiff from the DCMS and/or the TMA with respect to the complaints and proceedings relating to the patients Fleming, Fair, and Randle; and (2) disseminating to the Texas Board of Medical Examiners, the National Practitioner Data Bank, the general memberships of the DCMS and/or the TMA, and/or any other person or entity, any report of sanctions imposed by the DCMS and/or the TMA against the Plaintiff, with respect to the complaints and proceedings relating to the patients Fleming, Fair and Randle.

IT IS THEREFORE ORDERED that the DCMS and the TMA, their agents, employees, directors, representatives, attorneys, and all acting in conceit with them, are permanently enjoined from and are commanded forthwith to refrain from directly or indirectly (1) expelling the Plaintiff from the DCMS and/or the TMA with respect to the complaints and proceedings relating to the patients Fleming, Fair, and Randle; and (2) disseminating to the Texas Board of Medical Examiners, the National Practitioner Data Bank, the general

memberships of the DCMS and/or the TMA, and/or any other person or entity, any report of sanctions imposed by the DCMS and/or the TMA against the Plaintiff, with respect to the complaints and proceedings relating to the patients Fleming, Fair and Randle.

IT IS FURTHER ORDERED that the claims of Plaintiff and Defendants for the recovery of their respective attorneys' fees are denied.

IT IS FURTHER ORDERED that all costs of court expended or incurred in this cause are adjudged against the DCMS and TMA, jointly and severally. All writs and processes for the enforcement and collection of this judgment or the costs of court may issue as necessary.

IT IS FURTHER ORDERED that the Bond, in the amount of $1,000.00, previously filed by Plaintiff herein in connection with the Temporary Restraining Order issued on October 24, 1994, shall be released to Plaintiff's counsel by the District Clerk.

All other relief not expressly granted in this Judgment is DENIED.

SIGNED this 2nd day of October, 1996.

s/ Candace G. Tyson
JUDGE PRESIDING

APPENDIX C — LETTER OF THE SUPREME COURT OF TEXAS DENYING PETITION FOR REVIEW DATED AUGUST 23, 2001

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

August 23, 2001

Mr. Joseph O. Collins, Jr.
Kessler & Collins, P.C.
5950 Sherry Lane, Suite 222
Dallas, TX 75225

Mr. Scott P. Stolley
Thompson & Knight
1700 Pacific Avenue, Suite 3300
Dallas, TX 75201-4693

RE: Case Number 01-0438
Court of Appeals Number: 05-97-00027-CV
Trial Court Number: 94-11112-B

Style: EMMANUEL E. UBINAS-BRACHE, M.D.
v.
DALLAS COUNTY MEDICAL SOCIETY
and TEXAS MEDICAL ASSOCIATION

Appendix C

Dear Counsel:

Today, the Supreme Court of Texas, Justice Hankinson not sitting, denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by s/ Tanya R. Hunter
Tanya R. Hunter, Deputy Clerk

cc: Ms. Lisa Matz, Clerk
Mr. Jim Hamlin

APPENDIX D — LETTER OF THE SUPREME COURT OF TEXAS DENYING MOTION FOR REHEARING DATED OCTOBER 18, 2001

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

October 18, 2001

Mr. Joseph O. Collins, Jr.
Kessler & Collins, P.C.
5950 Sherry Lane, Suite 222
Dallas, TX 75225

Mr. Scott P. Stolley
Thompson & Knight
1700 Pacific Avenue, Suite 3300
Dallas, TX 75201-4693

RE: Case Number 01-0438
Court of Appeals Number: 05-97-00027-CV
Trial Court Number: 94-11112-B

Style: EMMANUEL E. UBINAS-BRACHE, M.D.
v.
DALLAS COUNTY MEDICAL SOCIETY
and TEXAS MEDICAL ASSOCIATION

Appendix D

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing in the above-styled case (Justice Hankinson not sitting).

Sincerely,

John T. Adams, Clerk

by s/ Gena Pelham
Gena Pelham, Deputy Clerk

cc: Ms. Lisa Matz, Clerk
Mr. Jim Hamlin

2/25

(2)

Supreme Court, U.S.
FILED
FEB 25 2002
CLERK

No. 01-1081

In The

Supreme Court of the United States

EMMANUEL E. UBIÑAS-BRACHE, M.D.,

Petitioner,

v.

DALLAS COUNTY MEDICAL SOCIETY
and TEXAS MEDICAL ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeals
For The Fifth District Of Texas At Dallas

RESPONDENTS' BRIEF IN OPPOSITION

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**Counsel of Record*

Counsel for Respondents

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OR CALL COLLECT (402) 342-2831

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the Dallas County Medical Society and the Texas Medical Association, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the Court of Appeals for the Fifth District of Texas in *Dallas County Medical Society and Texas Medical Association v. Ubiñas-Brache, M.D.*, 2001 Tex. App. LEXIS 818 (Tex. App. – Dallas Feb. 7, 2001, pet. denied).

STATEMENT OF THE CASE

Petitioner, Dr. Ubiñas, seeks review of a state court judgment by petition for writ of certiorari. However, no federal questions were presented in the trial court, nor decided by the Dallas Court of Appeals.[1] Dr. Ubiñas brought suit in state court, alleging breach of contract and violations of common law rights to due process. He complained that the Dallas County Medical Society and the Texas Medical Association had a duty under their bylaws and Hearings Procedural Manual, to provide "a fair and good faith proceeding" and "fundamental fairness" in conducting a disciplinary proceeding against him, and that they breached their agreement to do so.

[1] In this brief in opposition, Respondents will demonstrate, in accordance with *Adams v. Robertson*, 520 U.S. 83, 91-92 (1997), and Supreme Court Rule 15.2, that the Questions Presented have not been preserved. Respondents reserve the right to respond on the merits should the petition for writ of certiorari be granted.

(Tr. 41, Pet. App. 6a) He also complained that the disciplinary hearing did not comport with procedural due process under the Texas Constitution, TEX. CONST. art. I, § 19. (Tr. 44, Pet. App. 6a) There were no federal questions presented by Plaintiff's Second Amended Petition. (Tr. 34-51)

Based on the jury's breach of contract finding, the trial court issued an injunction that Dr. Ubiñas should not be expelled from the Dallas County Medical Society and the Texas Medical Association. (Pet. App. 26a) The medical society and association appealed to the Fifth District Court of Appeals at Dallas, arguing primarily that no breach of contract claim was available because a state statutory scheme grants immunity from suit unless there was proof of malice in the conduct of the disciplinary proceedings. In February 2001, the Dallas Court of Appeals reversed the trial court's judgment, holding that the Texas Medical Practice Act, TEX. REV. CIV. STAT. ANN. art. 4495b, §§ 5.06(l), (m)[2] provides immunity for medical peer review unless there is a finding that the peer review committee acted with malice. (Pet. App. 13a) Because Dr. Ubiñas failed to obtain an affirmative finding of malice – the threshold standard to state a cause of action – the court held that he waived recovery. (Pet. App. 13a). The court of appeals further found that the malice standard did not violate the Open Courts Provision of the Texas Constitution, TEX. CONST art. I, § 13. (Pet. App. 18a) There

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[2] This statute has not been simply repealed, as indicated by Petitioner (Pet. at 2). Rather, it was recodified at TEX. OCC. CODE ANN. § 160.010(b) (Vernon 2002).

was no ruling by the state court of appeals on any federal question.

After the court of appeals denied Dr. Ubiñas's motion for rehearing, he then appealed to the Texas Supreme Court by petition for review. He globally raised impairment of contract and due process complaints under the United States Constitution, but never argued the particularized questions presented here under those constitutional provisions. The Texas Supreme Court declined to review the judgment of the Dallas Court of Appeals on August 23, 2001, and denied rehearing on October 18, 2001. (Pet. App. 20a, 31a)

REASONS FOR DENYING THE WRIT

The Questions Presented in the Petition for Writ of Certiorari were neither presented, nor preserved for this Court's review. Dr. Ubiñas urges here that his claims should be analyzed under federal constitutional standards. He argues that by ruling that he did not have a contract claim against the Dallas County Medical Society, the court of appeals was "[d]isregarding this Court's holding in *General Motors Corp. v. Romein*, 503 U.S. 181 (1992) that the court must apply federal law to decide whether there is a contract under the Contract Clause . . . . " (Pet. at 11) Yet Dr. Ubiñas never even cited the *Romein* case to the court of appeals or to the Texas Supreme Court. He also argues that this Court should decide "the difficult question of when a contract right is also a property right for purposes of the Due Process Clause . . . . " (Pet. at 12) This issue likewise was not

presented or decided below. Finally, Dr. Ubiñas argues that a medical society should qualify as a state actor for purposes of the Due Process Clause (Pet. at 12), despite the fact that the trial court ruled adversely on this point and Dr. Ubiñas never challenged that ruling on appeal.

1. The claimed basis for jurisdiction is unavailable because no substantial federal question was presented or decided in the state court proceedings.

Petitioner asserts jurisdiction in this Court under 28 U.S.C. § 1257(a), the jurisdictional statute that governs this Court's review of state court judgments by certiorari. (Pet. at 1) But it is essential to jurisdiction under section 1257 that a substantial federal question was raised and preserved in the state court proceedings. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997). The policy considerations underlying this jurisdictional requirement are twofold: (1) in a federal system, it is important that the state court have the first opportunity to consider the applicability of state statutes in light of a constitutional challenge, since the statute may be construed to uphold its constitutionality; and (2) even if a federal question is raised below, other independent and adequate state grounds may block its consideration. *See Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); *see also Illinois v. Gates*, 462 U.S. 213, 218-220 (1983). This Court has repeatedly acknowledged that state courts are competent to adjudicate federal constitutional claims and should be given the first opportunity to pass on federal challenges. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 105 (1980).

Section 1257 also requires that there be a final judgment or decree rendered "by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). In this case, the final decision is that of the Dallas Court of Appeals because the Texas Supreme Court declined to review the case. *See Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678, n.1 (1968). The Dallas Court of Appeals did not consider a federal constitutional challenge to the Texas Medical Practice Act, because none was presented. Furthermore, independent non-federal, statutory grounds were sufficient for resolution of this claim given the immunity provisions in the Act. Under these circumstances, United States Supreme Court review is unavailable.

2. Petitioner failed to comply with this Court's jurisdictional rules requiring him to demonstrate that a federal question was preserved.

Consistent with statutory jurisdictional requirements, this Court's Rules likewise mandate that, in an appeal from a state court, the Petitioner must demonstrate that he has preserved a substantial federal question for presentation to this Court. Rule 14.1(g)(i) requires that if review of a state court judgment is sought, the Petitioner must specify the stage of the proceedings where the federal questions sought to be reviewed were raised, demonstrate how the questions were raised and passed upon by the state trial and appellate courts, and provide pertinent quotations from the record specifically referring to where the matter appears. This is necessary "so as to show that the federal question was timely and properly

raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." Rule 14.1(g)(i).

Dr. Ubiñas has generally alleged jurisdiction, but wholly failed to demonstrate how a federal question was presented and preserved in the state court proceedings. (Pet. at 1) Indeed, Dr. Ubiñas cannot make this showing because the federal questions before this Court were not raised below. None of the seventeen reply points of error that Dr. Ubiñas made in the court of appeals discuss impairment of contract under Article I, § 10 of the United States Constitution. (*See* Appellee's Reply Points reprinted at App. 1-4 herein.) Nor do the reply points reference the Due Process Clause of the Fourteenth Amendment, although Dr. Ubiñas argued this constitutional provision in his briefing. His argument below, however, was that federal due process was irrelevant: "The DCMS' [Dallas County Medical Society] arguments of due process requirements under federal and state law – including whether the DCMS is a 'state actor' – thus are irrelevant. The only 'due process' at issue is that set forth and defined in the Manual." (Appellee's Brief at 21)

In fact, in Dr. Ubiñas's Sur-Reply Brief to Appellant's Reply Brief, he conceded that the case does not concern federal constitutional issues: "The case submitted to the jury is not about violations of the Texas or United States Constitutional due process provisions – the trial court ruled that the acts of Appellants did not constitute state action." (Appellee's Sur-Reply Brief at 1) Instead, he argued that the immunity provisions of the Texas Medical Practice Act cannot bar his suit, because that would deprive him of "his valuable contract rights without recourse in the courts [which] violates the Open Courts

Provision of the Texas Constitution, as it would restrict the well-recognized common law cause of action for breach of contract." (Appellee's Sur-Reply Brief at 12) These quoted arguments demonstrate that Dr. Ubiñas was not urging constitutional violations under the United States Constitution at the Dallas Court of Appeals. Consequently, there is no ruling from that court on federal constitutional grounds. (*See* Pet. App. 1a-22a.)

After the Dallas Court of Appeals reversed the injunction granted by the trial court, Dr. Ubiñas then changed course in his motion for rehearing and argued that the ruling violated his federal due process rights and impaired his contract with the Dallas County Medical Society. He argued that: (1) the ruling violated the Open Courts Provision of the Texas Constitution and the First and Fourteenth Amendments of the United States Constitution; (2) the Contract Clause of the United States Constitution prevents state action that deprives citizens of their private contract rights; and (3) the decision violates the federal Due Process Clause and the Texas Constitutional Due Course of Law Clause. (*See* Motion for Rehearing Issues reprinted at App. 5 herein.) It is improper, however, under Texas practice, to raise new federal constitutional issues for the first time on appeal. *See Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993) ("As a rule, a claim, including a constitutional claim, must have been asserted in the trial court in order to be raised on appeal.")

Thereafter, on petition for review to the Texas Supreme Court, Dr. Ubiñas made the same complaints as in his motion for rehearing. (*See* Petition for Review Issues, reprinted at App. 6 herein.) He globally argued

that the court of appeals' application of the immunity provisions of the Texas Medical Practice Act violated the Contract Clause, U.S. CONST. art. I, § 10. He urged that the court's "interpretation of the Act renders it unconstitutional under the Contract Clause, as it applied the statute to void a contract obligation; in doing so the Court effected a change in the law that substantially impaired the contract." (Pet. for Review at 11) For support, he cited *Allied Structural Steel Co. v. Spannus*, 438 U.S. 234, 250 (1978), and *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). *Id.* But his Contract Clause question framed to this Court is completely different. It is whether the court of appeals incorrectly disregarded *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), because federal law must be applied to decide whether there is a contract for Contract Clause analysis. (Pet. at 11) This was never argued before, nor was the *Romein* case cited at any stage of the state proceedings. The Dallas Court of Appeals did not "disregard" *Romein* because the question of its applicability for Contract Clause analysis was never briefed. Indeed, Dr. Ubiñas now cites twenty-six additional federal cases as authority in his Petition for Certiorari that he never relied upon in the state trial and appellate courts. Only *Allied Structural Steel* and *U.S. Trust v. New Jersey* were advanced as authority below.

The due process arguments presented in the Petition for Certiorari – whether a contract right is also a property right and whether a medical society qualifies as a state actor for purposes of federal due process analysis – were likewise not presented and not preserved. Indeed, as demonstrated above, Dr. Ubiñas asserted that federal due

process was irrelevant. Under these circumstances, review by this Court should be denied.

CONCLUSION

Because the Questions Presented in the Petition for Writ of Certiorari were not preserved for this Court's review, the Dallas County Medical Society and the Texas Medical Association respectfully request that this Court deny the petition.

Respectfully submitted,

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February 25, 2002

APPENDIX

REPLY POINTS IN DR. UBIÑAS'S APPELLEE'S BRIEF TO COURT OF APPEALS FOR FIFTH DISTRICT OF TEXAS AT DALLAS:

APPELLEE'S REPLY POINTS

The First Issue: The DCMS' Breach of Its Covenants and Duties

Reply Point One

The trial court did not err by overruling the DCMS' and the TMA's requests for the trial court to rule as a matter of law that Dr. Ubiñas received fundamental fairness and a fair and good faith proceeding. (In response to Appellants' First Point of Error)

Reply Point Two

The evidence is legally and factually sufficient to support the jury's findings that the DCMS and the TMA failed to provide Dr. Ubiñas fundamental fairness and a fair and good faith proceeding. (In response to Appellants' Second Point of Error)

The Second Issue: The Trial Court Did Not Abuse Its Discretion in Conducting the Trial Proceedings

Reply Point Three

The trial court did not err and acted within its discretion in excluding a portion of the testimony of the DCMS' and the TMA's expert Jerry Bell. (In response to Appellants' Third Point of Error)

Reply Point Four

The trial court did not err and acted within its discretion in excluding the testimony of the

DCMS' and the TMA's fact witness George Toledo. (In Response to Appellants' Eleventh Point of Error)

The Third Issue: The Trial Court Correctly Ruled on the DCMS' Requested Issues of Waiver and Estoppel

Reply Point Five

The evidence does not conclusively establish that Dr. Ubiñas is estopped to complain about the peer-review proceeding, and the jury's findings of no estoppel are not against the great weight and preponderance of the evidence. (In response to Appellants' Fourth Point of Error)

Reply Point Six

The trial court did not err but properly refused the DCMS' and the TMA's requested instruction on waiver. (In response to Appellants' Fifth Point of Error)

The Fourth Issue: The Peer-Review Immunity Provisions Do Not Apply

Reply Point Seven

The trial court did not err by overruling the DCMS' and TMA's requests for the court to rule that as a matter of law the DCMS and the TMA are immune under the Texas Medical Practice Act. (In response to Appellants' Sixth Point of Error)

Reply Point Eight

The trial court did not err by refusing to submit the DCMS' and the TMA's question inquiring whether the DCMS and the TMA acted with malice. (In response to Appellants' Seventh Point of Error)

Reply Point Nine

The trial court did not err by overruling the DCMS' and the TMA's requests for the court to rule that as a matter of law the DCMS and the TMA complied with the Health Care Quality Improvement Act. (In response to Appellants' Fourteenth Point of Error)

Reply Point Ten

The trial court did not err by refusing to submit the DCMS' and TMA's jury question inquiring whether the DCMS and the TMA failed to comply with the Health Care Quality Improvement Act. (In response to Appellants' Fifteenth Point of Error)

The Fifth Issue: The Trial Court Did Not Abuse Its Discretion by Granting Injunctive Relief

Reply Point Eleven

The trial court did not err by overruling the DCMS' and the TMA's requests for the court to rule that as a matter of law Dr. Ubiñas will not suffer immediate and irreparable harm. (In response to Appellants' Eighth Point of Error)

Reply Point Twelve

The evidence is legally and factually sufficient to support the jury's findings that Dr. Ubiñas will suffer immediate and irreparable harm. (In response to Appellants' Ninth Point of Error)

Reply Point Thirteen

The trial court did not err or abuse its discretion in granting injunctive relief. (In response to Appellants' Tenth Point of Error)

Reply Point Fourteen

The trial Court did not err by entering an overly broad injunction. (In response to Appellants' Twelfth Point of Error)

The Sixth Issue: The DCMS Is Not Entitled to Attorney's Fees

Reply Point Fifteen

The trial court did not err or abuse its discretion by refusing the DCMS' and the TMA's requests for attorney's fees. (In response to Appellants' Thirteenth Point of Error)

Reply Point Sixteen

The trial court did not err by refusing the DCMS' and the TMA's requests for the court to rule that as a matter of law Dr. Ubiñas lawsuit was frivolous, unreasonable, without foundation, or brought in bad faith. (In response to Appellants' Sixteenth Point of Error)

Reply Point Seventeen

The trial court did not err by refusing the DCMS' and the TMA's requested jury question inquiring whether Dr. Ubiñas's lawsuit was frivolous, unreasonable, without foundation, or brought in bad faith. (In response to Appellant's Seventh Point of Error)

Appellee's Cross-Points: Dr. Ubiñas Is Entitled to Recover Attorney's Fees

Cross-Point One

The trial court erred or abused its discretion in denying Dr. Ubiñas claim for attorney's fees under Chapter 37 of the Declaratory Judgment Act. (Final Judgment, Tr. 179-80)

Cross-Point Two

The trial court erred or abused its discretion by denying Dr. Ubiñas's requests for the court to determine the amount of attorney's fees to which Dr. Ubiñas is entitled. (Final Judgment, Tr. 179-80)

ISSUES PRESENTED IN DR. UBIÑAS'S MOTION FOR REHEARING:

Issues Presented for Review

Issue 1: Does this Court's application of the Texas Medical Practice Act ("Act") to deprive Dr. Ubiñas of his claim for breach of contract violate the First and Fourteenth Amendments to the United States Constitution and the open courts provision of the Texas Constitution?

Issue 2: Does this Court's application of the Act to deprive Dr. Ubiñas of his contract rights violate the contract clause of the United States Constitution?

Issue 3: Does this Court's application of the Act to deprive Dr. Ubiñas of property and liberty rights without just compensation violate the due process clause of the United States Constitution and the due course of law clause of the Texas Constitution?

Issue 4: Did this Court err by interpreting the Act to provide Appellants with absolute immunity, absent a showing of malice?

Issue 5: Did this Court err by holding that the Act precludes injunctive relief when an association violates its bylaws?

ISSUES PRESENTED IN DR. UBIÑAS'S PETITION FOR REVIEW TO THE TEXAS SUPREME COURT:

Issues Presented for Review

Issue 1: Does the Act negate a medical association's agreement with its members to provide them with rights in a peer review proceeding that exceed the minimal statutory rights granted under the Act?

Issue 2: If so, is the Act unconstitutional under the open courts provisions of the Texas and United States Constitutions?

Issue 3: Did the Court of Appeals' application of the Act violate the contract clause of the United States Constitution?

Issue 4: Did the Court of Appeals' application of the Act violate the due process and due course of law provisions of the United States and Texas Constitutions?

Issue 5: Is a medical association entitled to absolute immunity from suit, including a suit for injunctive relief based on its breach of contract, even if the association fails to plead such immunity as an affirmative defense?

Issue 6: Is a medical association that is found by a jury to have violated its contract with its physician member entitled to recover its attorney's fees under the Act?

Supreme Court, U.S.
FILED
MAR 12 2002
CLERK

(3)

No. 01-1081

IN THE

Supreme Court of the United States

EMMANUEL E. UBIÑAS-BRACHE, M.D.,

Petitioner,

v.

DALLAS COUNTY MEDICAL SOCIETY
and TEXAS MEDICAL ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, FOR THE FIFTH DISTRICT OF TEXAS, AT DALLAS

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

By not opposing Petitioner's arguments on the merits, Respondents' Brief in Opposition effectively concedes that the substantive questions presented by the Petition for Writ of Certiorari merit this Court's review. (Resp. Br. 1 n.1). Respondents contend only that the questions presented in the Petition were not adequately presented and preserved below. They rely primarily on *Adams v. Robertson*, 520 U.S. 83, 91-92 (1997). The record shows, however, that the Texas Court of Appeals and the Supreme Court of Texas each had "a fair opportunity to address the federal question that is sought to be presented here," in full satisfaction of the *Adams* standard. 520 U.S. at 87 (*quoting Webb v. Webb*, 451 U.S. 493, 501 (1981)).

1. This Court Has Jurisdiction under 28 U.S.C. § 1257 Because the Questions Presented Were Also Adequately Presented to the Texas Courts.

Where the state high court is silent on the federal questions presented to this Court, as the Supreme Court of Texas was in this case, Petitioner bears the burden of overcoming the assumption that those questions were not properly presented. *Adams*, 520 U.S. at 86-87. That assumption is defeated, and the questions presented are deemed to have been adequately preserved for this Court's review, if Petitioner demonstrates that he afforded the state courts a "fair opportunity" to address those questions. *Id.* at 87.

After the Texas court of appeals handed down its decision reversing the trial court on grounds Petitioner Dr. Ubiñas challenges here, he gave the Texas courts a fair opportunity to address the questions presented on the Petition. In his Motion for Rehearing to the Texas Court of Appeals, Dr. Ubiñas argued that "The Contract Clause of the United States Constitution Prevents State Action That Deprives Citizens of Their Private Contract Rights." (App. B *infra* 19a). He also argued that "This Court's Ruling Violates the Due Process Clause of the

United States Constitution. . . ." (App. B *infra* 20a). Later, in his Petition for Review to the Supreme Court of Texas, Dr. Ubiñas again argued that the "Court of Appeals' Application of the Act Violated the Contract Clause of the United States Constitution," and that its "Application of the Act Violated the Due Process and Due Course of Law Clauses of the United States and Texas Constitutions." (App. *infra* 6a).

The Texas Court of Appeals denied Dr. Ubiñas' Motion for Rehearing, and the Supreme Court of Texas chose not to review the case. Both of those courts, however, had ample opportunity to review the federal questions now presented for this Court's review.

To provide the state courts a fair opportunity to resolve federal questions, petitioners need only present those questions to the state courts with "fair precision." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) (*quoted in Adams*, 520 U.S. at 87). The jurisdiction of this Court "does not depend on the citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982). Indeed, this Court has held that petitioners are "not confined here to the same arguments which were advanced in the courts below." *Illinois v. Gates*, 462 U.S. 213, 220 (1983) (*quoting Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899)).

Dr. Ubiñas argued to the Court of Appeals and the Supreme Court of Texas that his federal rights under the Impairment of Contracts Clause, Art. 1 § 10, and the Due Process Clause of the Fourteenth Amendment were violated. (App. *infra* 6a, 9a-13a, 19a-21a). Those courts had a fair opportunity to address those claims. The refinement of those arguments on Petition to this Court does not impede jurisdiction under 28 U.S.C. § 1257.

2. The Federal Questions Presented Here Were Timely Presented to the Texas Courts Because the Texas Court of Appeals' Decision Rested on a New and Unexpected Basis That Raised and Framed for the First Time the Constitutional Issues in This Case.

We are aware that when the federal constitutional question is clearly articulated for the first time in a state court petition for rehearing, as it was in this case, it is generally considered to have been raised too late for review in this Court. *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-67 (1932). That general rule, however, does not apply when the "grounds of the [state court] decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right." *Id.* at 367. *See also Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 n.9 (1980) (a federal claim is "adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation."); *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. 673, 677-78 (1930) (holding that a due process claim "was timely, since it was raised at the first opportunity" when first asserted in a petition for rehearing to the state court following its application of a "new construction" of a state statute).

Dr. Ubiñas won in the trial court and the Respondents challenged the judgment in the court of appeals essentially on an immunity theory. Dr. Ubiñas raised the federal questions presented for this Court's review at the first opportunity, which in this case was the Petition for Rehearing to the Texas Court of Appeals. Applying Texas, not federal law, the Texas Court of Appeals interpreted the Texas Medical Practices Act ("the Act") to preclude even injunctive and declaratory relief against health care entities engaged in peer review activities, (App Pet. 11a), effectively impairing Dr. Ubiñas' rights to a "fair and good faith proceeding" under his contract with the Respondents. No Texas court had previously interpreted the Act to provide such far-

reaching immunity. Only after that decision did Dr. Ubiñas have a basis to claim that the Act, as interpreted, violated the federal Constitutional prohibition against the impairment of contracts.

Likewise, the decision of the Court of Appeals was unprecedented in its interpretation of the Act to abrogate Dr. Ubiñas' contract right to a fair and good faith proceeding, a property interest protected by the federal Constitution. Thus, the grounds of that court's decision provided Dr. Ubiñas for the first time with an unexpected basis on which to claim that his federal rights under the Due Process and Impairment of Contracts clauses were violated. Accordingly, the Petition for Rehearing to the Texas Court of Appeals was Petitioner's first opportunity to assert his federal Due Process claim and Dr. Ubiñas properly availed himself of that opportunity.

Respondents' Opposition argues that Dr. Ubiñas raised his federal constitutional claims too late under Texas practice. (Resp. Br. 7). The federal questions presented for this Court's review, however, arise from Respondents' immunity claim, an affirmative defense that *Respondents* failed to raise clearly in the trial court. (App. Pet. 8a). In their trial pleadings, Respondents failed even to cite the code section that was eventually interpreted by the Court of Appeals to provide immunity from Dr. Ubiñas' suit to enforce his contractual rights. (App. Pet. 7a). The Texas Court of Appeals permitted Respondents to make the immunity claim for the first time on appeal, and reached an unprecedented resolution of that claim. The Texas Court of Appeals' resolution of Respondents' late-developing immunity claim is the basis for the federal questions presented for this Court's review and were properly asserted below at the first opportunity.

CONCLUSION

For the foregoing reasons, and those stated in our Petition, the judgment of the Texas Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS FROM THE PETITION FOR REVIEW OF DR. UBIÑAS

IN THE SUPREME COURT OF TEXAS

No. _____

EMMANUEL E. UBIÑAS-BRACHE, M.D.,

Petitioner,

v.

DALLAS COUNTY MEDICAL SOCIETY
AND
TEXAS MEDICAL ASSOCIATION

Respondents.

PETITION FOR REVIEW

* * *

C. The Court Misinterpreted the Plain Language of the Act

The Act limits its protection to peer review proceedings conducted pursuant to the association's bylaws. Art. 4495b, § 1.03(a)(6) [App., tab 12.] This limitation incorporates the well-established common law contract rights afforded to association members in those bylaws, and by doing so incorporates important constitutional limitations on the association's right to claim immunity if it does not comply

with its bylaws. The threshold issue under the Act, by its very terms *and* by way of constitutional limitation, therefore, is not whether the association acted with malice, but whether the peer review proceeding qualifies for the Act's protection — an issue that requires an initial factual determination that the association complied with its agreement with its members. Only if the court finds that the association followed its bylaws does the affirmative defense of the association's absence of malice become an issue. The Medical Associations did not dispute that the DCMS' bylaws required it to provide fundamental fairness and a fair and good faith proceeding. The Court's ruling to the contrary ignores the plain language of the statute and the Texas common law upon which the requirement is based.

Issue 2: The Court of Appeals' Application of the Act Violated Dr. Ubiñas' Rights to Access to the Courts Under the United States and Texas Constitutions

The Texas Constitution provides that all courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law. TEX. CONST. art. I, §§ 13, 19 [App., tabs 17, 18.] The provision prohibits the legislature from abrogating a citizen's right to assert a well-established common law cause of action, if the legislature fails to state how the abrogation constitutes a reasonable exercise of the police power in the interest of the general welfare. *See, e.g. David McDavid Nissan, Inc. v. Subaru of America, Inc.*, 10 S.W.3d 56, 67 (Tex. App. — Dallas 1999, pet. granted). The United States Constitution, as applied to state action, provides similar protection. U.S. CONST. amends. I, XIV. [App., tabs 14, 15.]

Appendix A

A. The Court Misapplied the Doctrine of Judicial Nonintervention

The Court of Appeals held that the Texas Constitution does not grant the citizens of this state a well-established right to access to the courts to enforce a breach of contract action against their association. [App. tab 3, Opn. pp. 9-10.] TEX. CONST. art I, § 13. [App., tab 17.] The Court concluded that a contract claim against a private association based on a member's expulsion is not a well-recognized or well-defined common law action in this state because of the doctrine of judicial nonintervention, which precludes courts from interfering with a private association's internal affairs. [App., tab 3.] Opn., p. 6, *citing, inter alia, Dickey v. Club Corp. of Am.*, 12 S.W.3d 172, 176 (Tex. App — Dallas 2000, pet. denied); *Brotherhood of R.R. Trainmen v. Price*, 108 S.W.2d 239, 241 (Tex. Civ. App. — Galveston 1937, writ dism'd w.o.j.). The cases cited by the Court do not support its position, as none involve a cause of action based on the breach of a specific contract provision. Also, courts in this state consistently have distinguished between expulsion from social clubs and expulsion from associations that confer benefits that affect a member's property and liberty rights. Cases such as the *Dickey* case that involve a social club are not applicable to a case such as this one, in which the expulsion of Dr. Ubiñas will have devastating consequences on his career, as determined by the jury when it found that Dr. Ubiñas would be irreparably harmed by the expulsion. [App., tab 2.]

The Court of Appeals misapplied the doctrine of nonintervention, which has an important qualification that

is as clearly settled as the nonintervention rule: The doctrine does not apply unless the association follows its own rules. *See, e.g.*, Dorsaneo, TEXAS LITIGATION GUIDE, § 190.04[1]. The society "must confine itself to the powers vested in it, and in good faith pursue the matters prescribed by its laws, such laws not being in violation of the laws of the land, or in any alienable right of the member." *Thompson v. Grand Int'l Bhd. Of Locomotive Eng'rs*, 91 SW. 834, 837 (Tex. Civ. App. — 1905, no writ). An association's order of suspension is subject to review by a court, and its enforcement will be enjoined if it is accomplished contrary to the rules and regulations of the association. *American Inst. of Real Estate Appraisers v. Hawk*, 436 S.W.2d 359, 365 (Tex. Civ. App. — Houston [14th Dist.] 1968, no writ). Finally, the Court acknowledged that courts intervene in associations' conduct that is illegal, involves civil or property rights and are against public policy. [App., tab 3; Opn., p. 13.] A jury found that the Medical Associations acted contrary to their bylaws; they therefore acted illegally under their contractual authority. Their actions deprived Dr. Ubiñas of his civil and property rights, and are against public policy, as discussed below. The trial court properly submitted to the jury the issue of whether the Medical Associations followed their bylaws. *See, e.g., Thompson*, 91 SW. at 838.

B. The Legislature's Abrogation of Dr. Ubiñas' Claim Does Not Constitute a Reasonable Exercise of the State's Police Power

The Court of Appeals erroneously held that the Act's requirement of a showing of malice as a threshold issue promotes the public policy of having physicians review the

actions of other physicians and of affording them protection in those proceedings. [App., tab 3; Opn., p. 13.] The Court's stated policy does not apply to the facts of this case. First, the Medical Associations and their physician members who participated in the proceeding were bound by the same bylaws that bound Dr. Ubiñas, and they were aware of their contractual restrictions in conducting peer review proceedings. The Medical Associations failed to incorporate the Act's protection in their bylaws. The Court articulated no public policy that is served by applying, as it has done, the bylaws of an organization to bind the party subject to expulsion, but not to bind the members conducting the expulsion or the association that wrote the bylaws. The Court also failed to cite any case that supports its conclusion that public policy is served by the legislative or judicial rewriting of private contracts. Second, Dr. Ubiñas did not bring suit against any individual members, and did not seek damages, but rather sought the equitable relief of an injunction based on the Medical Associations' breach of contract. The stated public policy of protecting peer review proceedings — to foster open and frank communications by physicians without the threat of retaliation — does not apply. Third, courts and Congress have recognized that abuse can occur if physicians who suffer wrong by a peer review committee are denied all judicial remedies, particularly where the physicians compete with one another. *See, e.g., Imperial v. Suburban Hosp. Assoc. Inc.*, 37 F.3d 1026, 1031 (4th Cir. 1994). Finally, the Court of Appeals' application of the Act violates public policy, as it deprives Dr. Ubiñas of his rights in violation of the contract and due process clauses of the United States Constitution, and the due course of law provision of the Texas Constitution, as discussed below.

Issue 3: The Court of Appeals' Application of the Act Violated the Contract Clause of the United States Constitution

The contract clause of the United States Constitution states, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." U.S. CONST. art. I, § 10, cl. 1. [App., tab 16.] The Court's interpretation of the Act renders it unconstitutional under the contract clause, as it applied the statute in void a contract obligation; in doing so the Court effected a change in the law that substantially impaired the contract. *See, e.g., Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234,250(1978) (invalidating a Minnesota statute that required an employer that closed its office to pay a pension funding charge); *United States Trust Co. v. New Jersey*, 431 U.S. 1(1977) (invalidating a New Jersey statute that altered a statutory bond covenant relied upon by bond purchasers). The Court's action is not justified as reasonable and necessary to serve an important public purpose, as previously discussed. Courts must construe statutes in accordance with the contract clause. *See, e.g., Aerojet-Gen. Corp. v. Askew*, 511 F.2d 710, 723 (5th Cir. 1975), *cert. denied*, 423 U.S. 908 (1975). Application of the Act to defeat Dr. Ubiñas' contract rights violates the contract clause.

Issue 4: The Court of Appeals' Application of the Act Violated the Due Process and Due Course of Law Clauses of the United States and Texas Constitutions

The due process clause of the United States Constitution and the due course of law clause of the Texas Constitution preclude states from passing laws that deprive citizens of

their property rights, defined as "existing rules or understandings that stem from an independent source such as state law." U.S. CONST. amend. XIV; *Galvin v. New York Racing Ass'n*, 70 F.Supp.2d 163, 172-73 (E.D.N.Y. 1998), *aff'd*, 166 F.3d 1200 (2nd Cir. 1998); TEX. CONST. art. 1, § 19 [App., tabs 15, 18.] The suspension of credentials that affect an individual's ability to pursue his career implicates property interests. *Id.* Also a physician's contractual right to a hearing in actions that affect his medical career is a protected property interest. In such a case, the bylaws provide the procedure to be followed before a hospital authority can take disciplinary action. *See, e.g., Northeast Georgia Radiological Assocs. v. Tidwell*, 670 F.2d 507, 510 (5th Cir. 1982). A physician also has a protected liberty interest in such a case, as the term "liberty" for purposes of the Fourteenth Amendment extends to the right to practice any of the common occupations of life. *Shaw v. Hospital Auth. of Cobb County*, 507 F.2d 625, 628 (5th Cir. 1975). The Court applied the Act to deprive Dr. Ubiñas of his valuable property interest — his Contract Rights — and his right to the liberty to pursue his chosen profession. The Court's application of the Act to deprive him of those rights constitutes state action that violates the due process and due course of law clauses of the United States and Texas Constitutions. U.S. CONST. amend. XIV; TEX. CONST. art. 1, § 19 [App., tabs 15, 18.]

* * * *

APPENDIX B — EXCERPTS FROM THE MOTION FOR REHEARING OF DR. UBIÑAS

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

No. 05-97-00027-CV

DALLAS COUNTY MEDICAL SOCIETY AND
TEXAS MEDICAL ASSOCIATION,

Appellants,

v.

EMMANUEL E. UBIÑAS-BRACHE, M.D.,

Appellee.

APPELLEE'S MOTION FOR REHEARING

* * *

To the Honorable Court of Appeals:

Appellee Emmanuel Ubiñas-Brache ("Dr. Ubiñas") submits his motion for rehearing and asks the Court to reconsider its ruling reversing the trial court's judgment.

Appendix B

ISSUES PRESENTED FOR REVIEW

Issue 1: Does this Court's application of the Texas Medical Practice Act ("Act") to deprive Dr. Ubiñas of his claim for breach of contract violate the First and Fourteenth Amendments to the United States Constitution and the open courts provision of the Texas Constitution?

Issue 2: Does this Court's application of the Act to deprive Dr. Ubiñas of his contract rights violate the contract clause of the United States Constitution?

Issue 3: Does this Court's application of the Act to deprive Dr. Ubiñas of property and liberty rights without just compensation violate the due process clause of the United States Constitution and the due course of law clause of the Texas Constitution?

Issue 4: Did this Court err by interpreting the Act to provide Appellants with absolute immunity, absent a showing of malice?

Issue 5: Did this Court err by holding that the Act precludes injunctive relief when an association violates its bylaws?

STATEMENT OF FACTS

The Court of Appeals summarized the following facts. In 1984, Dr. Ubiñas joined the DCMS; membership in the DCMS is voluntary; each member must "agree" to be bound by the DCMS disciplinary procedures; Dr. Ubiñas brought suit based on breach of contract and violations of common law rights to due process; Dr. Ubiñas sought an injunction

only; a jury found that Appellants failed to provide Dr. Ubiñas with fundamental fairness and a fair and good faith proceeding, and Appellants' failure caused Dr. Ubiñas irreparable harm; the trial court enjoined Appellants from expelling Dr. Ubiñas. Opinion, pp. 1-2.

ARGUMENT AND AUTHORITIES

Overview: This Court's Holdings Present Constitutional Issues of First Impression

This Court has, in the name of judicial nonintervention, entered a ruling that constitutes the ultimate judicial intervention: It has rewritten the terms of a contract between private parties. This Court has applied the Texas Medical Practice Act ("the Act") to defeat Dr. Ubiñas's valuable contract right to fundamental fairness and a fair and good faith proceeding ("Contract Rights"), and held that those rights are not enforceable in the state of Texas. This Court went even further, and held that a physician can never enforce his contract rights against a private medical association in connection with a peer review proceeding unless he first pleads and proves malice. Opinion, p. 7. In doing so, the Court has ignored the Act's clear language that provides that the malice threshold is not available to medical associations unless they first comply with their own bylaws in conducting peer review proceedings. Tex. Rev. Civ. Stat. Ann. art. 4495b ("Tex. Med. Prac. Act."), §§ 1.03(a)(6), 5.06(1), (m). The Court has failed to cite a single case to support its holding, as none of the cited cases involved a court's interpretation of a medical association's contract to provide its members with a higher standard than the absence-of-malice standard

provided by the Act. The Court thus applied a state statute to deprive a citizen of a valuable contract right in violation of the Texas and United States Constitutions.

Issue 1: This Court's Ruling Violates the Open Courts Provision of the Texas Constitution and the First and Fourteenth Amendments

A. The Ruling

This Court has held that the open courts provision of the Texas Constitution does not protect Dr. Ubiñas' breach of contract action, based on an express covenant, to maintain his membership in Appellant DCMS. The Court first concludes that a contract claim against a private association based on a member's expulsion is not a well-recognized or well-defined common law action in this state because of the doctrine of judicial nonintervention. Opinion, p. 6, *citing Dickey v. Club Corp. of Am.*, 12 S.W.3d 172, 176 (Tex. App. — Dallas 2000, pet. denied); *Brotherhood of R.R. Trainmen v. Price*, 108 S.W.2d 239, 241 (Tex. Civ. App. — Galveston 1937, writ dism'd w.o.j.). The two cases cited by the Court do not support its position, however, as neither holds that the doctrine of judicial nonintervention applies to protect an association from a cause of action based on its breach of its bylaws in conducting disciplinary action against a member. Also, courts in this state have consistently distinguished between expulsion from social clubs and expulsion from associations that confer benefits that affect a member's property and civil rights. The *Dickey* case involves a social club; it is not applicable to a case such as this one, in which the expulsion of a physician from a medical society will have

devastating consequences on his career. The Court then holds that the Act bars Dr. Ubiñas' contract claim altogether, absent a showing of malice. The Court concludes that the legislature substituted a higher threshold standard of malice for contesting the actions of private associations involved in medical peer review. The Court concludes that the substitution is reasonable, in light of the Court's interpretation of common law to present other hurdles in pursuing actions concerning membership in a private voluntary association. In so holding, the Court also concludes that the malice threshold promotes the public policy of having physicians review the actions of other physicians and of affording some protections for the participants in those proceedings. Opinion, p.7. The Court's ruling conflicts with the plain language of the statute, and with well-established Texas law, as discussed below.

B. The Open Courts Provision of the Texas Constitution and the First and Fourteenth Amendments to the United States Constitution

All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law. TEX. CONST. art. I,. §§ 13, 19. The legislature may not abrogate the right to assert a well-established common law cause of action. *David McDavid Nissan, Inc. v. Subaru of America, Inc.*, 10 S.W.3d 56, 67 (Tex. App. — Dallas 1999, pet. granted). The United States Constitution, as applied to state action, provides similar protection. U.S. CONST. amends. I, XIV. A contract claim is a well-established common law cause of action. Where breach of an agreement does not constitute the breach

of a statutory provision, and the statute provides no other remedy in place of the common law claims, and the legislature fails to state how the abrogation of such a claim constitutes a reasonable exercise of the police power in the interest of the general welfare, the statute violates the open courts provision of the Texas Constitution. *David McDavid Nissan*, 10 S.W.3d. at 67.

C. Breach of an Association's Bylaws Gives Rise to a Claim for Breach of Contract

1. Texas Law Is Well-Recognized and Well-Defined

Courts in England and the United States long have interpreted the bylaws and rules of voluntary associations as contracts between an organization and its members, and that they provide enforceable contract rights. *See, e.g.*, F. Eric Fryar, Note, *Common Law Due Process Rights in the Law of Contracts*, 66 Tex. L. Rev. 1021, 1043 (1988). An expelled member seeking reinstatement will obtain a court hearing on the merits of his claim by alleging that the expulsion violated the association's own constitution, bylaws, rules or regulations. *Id.*, at 1043-44; William V. Dorsaneo III,12 TEXAS LITIGATION GUIDE §§ 190.01[3], 190.01[4], 190.02[1], 190.04[1], 190.04[2] (2000), *citing, e.g. Consolidated Forwarding Co. v. Union Truck Depot*, 356 S.W.2d 693, 696 (Tex. Civ. App. — Dallas 1962, no writ). This Court has ignored these well-established principles, first articulated by the Texas Supreme Court in 1884: ". . . [I]t has been generally held that clubs or societies, whether religious, literary or social, have the right to make their own rules upon the subject of the admission or exclusion of members, and these rules

may be considered as articles of agreement to which all who become members are parties." *Manning v. The San Antonio Club*, 63 Tex. 166, 1885 WL 7009 at *4 (1884). The association's constitution is a basic contract upon which the member's rights are based. *See, e.g., Taylor v. United States Ass'n of Journeymen, et al.*, 337 S.W.2d 421, 423-24 (Tex. Civ. App. — Fort Worth 1960, writ ref'd n.r.e.). The right to apply to the courts for redress of such injuries exists in favor of all citizens, and cannot be abridged by an association except by the consent of the member. *See, e.g. Lawrence v. Ridgewood Country Club*, 635 S.W.2d 665, 666-67 (Tex. App. — Waco 1982, writ ref'd n.r.e.) (noting that courts will intervene where associations breach their bylaws); *Musicians Protective Ass'n, Local 466 v. Semon*, 254 S.W.2d 211, 214 (Tex. Civ. App. — El Paso 1952, writ ref'd) (noting that constitution and bylaws of unions constitute a contract with the members and are binding on the union); *Jeffersonian Club v. Waugh*, 217 S.W.2d 103, 107 (Tex. Civ. App. — Galveston 1949, writ ref'd n.r.e.) (holding that, by joining an association, its members agree to settle disputes that arise in the method provided for in the constitution and bylaws).

2. Texas Courts Imply Contractual Rights to Due Process in Association Contracts

The common law of Texas, in addition to granting the citizens of this state a cause of action for breach of the express terms of a contract arising from an association's breach of its bylaws, also has long provided that members may seek judicial relief against their associations where property or civil rights are involved. The Texas Supreme Court articulated this rule in 1884, stating, "When membership in

certain societies confers upon the individual important benefits, as in aid societies, benevolent societies, etc., or peculiar advantages in trade and business, as in chambers of commerce, these are important and valuable rights which are protected by the law of the land, and are generally secured in some way by the charter of incorporation." *Manning*, 63 Tex. 166, 1885 WL 7009 at *4. When membership in an organization entitles its members to benefits, the member is deprived of pecuniary value upon his expulsion. *See, e.g., Thompson v. Grand Int'l Bhd. of Locomotive Eng'rs*, 91 S.W. 834, 836 (Tex. Civ. App. — 1905, no writ); *accord Jeffersonian Club*, 217 S.W.2d 103 at 108 (noting that questions for a court to pass on are those involving property or civil rights).

Courts also long have applied common law procedural limitations to the exercise of discretion by voluntary associations over their members, particularly when they discipline members. Fryar, 66 Tex. L. Rev. at 1042-43. Both the history and the operation of common law due process unmistakably mark it as a concept of contract law, and have implied the right to due process in the associations' bylaws, and thus the contracts, with their members. *Id.* at 1043. This Court did not explain why expulsion from a medical society does not involve protected rights, particularly as Appellants throughout this proceeding have acknowledged Dr. Ubiñas' right to due process. This Court, by ruling that physicians have no common law right to bring a claim for breach of contract against a medical society to challenge a peer review proceeding, has applied the Act to overturn two well-recognized common law rules, first, that association members have well-recognized contract rights created by their

associations' bylaws, and second, that Texas law will imply in those contracts a minimum right to due process in the conduct of disciplinary proceedings, where civil or property rights are involved. Dr. Ubiñas was entitled to more than the minimum due process rights; he had an express contractual right to a fair and good faith proceeding.

3. This Court Has Misapplied the Doctrine of Judicial Nonintervention

This Court relies upon the doctrine of nonintervention to reverse the jury's finding that Dr. Ubiñas was not afforded his Contract Rights as required under Appellants' bylaws. The doctrine, however, has an important qualification, which is as clearly settled as the nonintervention rule, that the society "must confine itself to the powers vested in it, and in good faith pursue the matters prescribed by its laws, such laws not being in violation of the laws of the land, or in any alienable right of the member." *Thompson*, 91 S.W. at 837. The doctrine of nonintervention does not apply unless the association follows its own rules. *See, e.g.*, Dorsaneo, TEXAS LITIGATION GUIDE, § 190.04[1]. The trial court properly submitted to the jury the issue of whether Appellants followed their own rules. *See, e.g., Thompson*, 91 S.W. at 838. An association's order of suspension is subject to review by a court, and its enforcement will be enjoined if it is accomplished contrary to the rules and regulations of the association. *American Inst. of Real Estate Appraisers v. Hawk*, 436 S.W.2d 359, 365 (Tex. Civ. App. — Houston [14th Dist.] 1969, no writ). The doctrine of judicial non-intervention does not apply to the issue of whether an association breached its bylaws.

D. The Public Policy Rationale Cited by the Court Does Not Apply in This Case

This Court held that the Act precludes all causes of action against associations based on peer review proceedings, absent a showing of malice as a threshold issue, concluding that this threshold promotes the public policy of having physicians review the actions of other physicians and of affording them protection in those proceedings. The Court's stated policy does not apply for several reasons. First, the Act does not provide that all peer review proceedings are protected, as it limits the Act's protection to those proceedings conducted in accordance with the bylaws of an association. Tex. Med. Prac. Act, § 1.03(a)(6). This limitation incorporates the well-established common law contract rights afforded to association members in those bylaws. The threshold issue under the Act, by its very terms, therefore is not whether the association acted with malice, but whether the peer review proceeding qualifies for the malice protection, an issue that requires an initial determination that the association followed its own bylaws. Only if the court finds that the association followed its bylaws — a fact question — does malice come into play. The parties did not dispute that the bylaws at issue provided for fundamental fairness and a fair and good faith proceeding. If the bylaws did not have such a requirement, Texas common law would have implied a minimum right to due process, a lower standard than the right to fundamental fairness and a fair and good faith proceeding. This Court's ruling reads out of the Act the statutory requirement that the bylaws must be followed, a requirement based on over a century of common law in this state. The Court's ruling therefore contradicts the plain language of the statute, and its ruling contradicts the stated public policy of the

legislature. Second, Appellants and their physician members who participated in the proceeding were bound by the same bylaws that bound Dr. Ubiñas, and they were aware of their contractual restrictions in conducting peer review proceedings. A jury found they breached their contract. There is no public policy served by applying, as this Court has done, the bylaws of an organization to bind the party subject to expulsion, but not to bind the members conducting the expulsion or the association that wrote the bylaws. Appellants had, and have, a simple solution: Rewrite their bylaws. They do not require legislative action to do so, and no public policy is served by legislative or judicial rewriting of private contracts. Third, Dr. Ubiñas did not bring suit against any individual members, and did not seek damages, but rather sought only the equitable relief of an injunction based on Appellants' breach of contract. The stated public policy of protecting peer review proceedings — to foster open and frank communications by physicians without the threat of retaliation — does not apply. Finally, this Court has cited no case to support its application of a public policy, contrary to the plain language of a statute, to void the terms of a private contract. To the contrary, such an application of the Act is against public policy, as it violates the contract and due process clauses of the United States Constitution, and the due course of law provision of the Texas Constitution. In so applying the Act, this Court has erroneously interpreted the Act, and in doing so has rendered the Act unconstitutional, under the Texas and United States Constitutions.

Appendix B

Issue 2: The Contract Clause of the United States Constitution Prevents State Action That Deprives Citizens of Their Private Contract Rights

The contract clause of the United States Constitution states, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." U.S. CONST. art. I, § 10, cl. 1. This Court has applied the Act to void not only section 1.03(a)(6) of the Act, and the well-settled Texas law upon which that section is based, but also to void Appellants' contractual obligation to Dr. Ubiñas. In doing so, this Court has overturned a jury finding of fact that Appellants failed to perform their contractual obligation. This Court's interpretation of the statute renders it unconstitutional under the contract clause of the United States Constitution, as it has applied the statute to void a contract obligation; in doing so the Court effected a change in the law that impaired the contract; and the impairment was substantial. *See, e.g., Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250, 98 S. Ct. 2716, 2725, 57 L. Ed.2d 727 (1978) (invalidating a Minnesota statute that required an employer that closed its office to pay a pension funding charge); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 32, 97 S. Ct. 1505, 1523, 52 L. E.2d 92 (1977) (invalidating a New Jersey statute that altered a statutory bond covenant relied upon by bond purchasers). This Court's application of the Act to impair a contract is not justified as reasonable and necessary to serve an important public purpose, as discussed in Issue 1, above. As stated, there can be no public policy served in rewriting the private contract at issue, as Appellants had a simple solution: They could have rewritten their bylaws. A statute is not to be construed as making any innovation upon the

common law which it does not fairly express. *See, e.g., Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304-05 (1959). This Court must construe the Act in accordance with the contract clause, and hold that application of the Act to defeat Dr. Ubiñas' contract rights violates his constitutional rights. *See, e.g., Aerojet-Gen. Corp. v. Askew*, 511 F.2d 710, 723 (5th Cir. 1975), *cert. denied*, 423 U.S. 908 (1975).

Issue 3: This Court's Ruling Violates the Due Process Clause of the United States Constitution and the Due Course of Law Clause of the Texas Constitution

The Fourteenth Amendment to the United States Constitution, the due process clause, protects property rights as defined by "existing rules or understandings that stem from an independent source such as state law." *Galvin v. New York Racing Ass'n*, 70 F.Supp.2d 163, 172-73 (E.D.N.Y. 1998), *aff'd*, 166 F.3d 1200 (2nd Cir. 1998) (concluding that the suspension of credentials that affect an individual's ability to pursue his career implicates property interests). A physician has protected property interests in his contractual right to a hearing in actions that affect his medical career. In such a case, the bylaws provide the procedure to be followed before a hospital authority can take disciplinary action. *See, e.g., Northeast Georgia Radiological Assocs. v. Tidwell*, 670 F.2d 507, 510 (5th Cir. 1982). The physician also has a protected liberty interest in such a case, as the term "liberty" for purposes of the Fourteenth Amendment extends to the right to practice any of the common occupations of life. *Shaw v. Hospital Auth. of Cobb Co.*, 507 F.2d 625, 628 (5th Cir. 1975). This Court has applied the Act to deprive Dr. Ubiñas

of his valuable property interest, his contractual right to fundamental fairness and a fair and good faith proceeding, which in turn directly impacts his liberty interests, as it limits his right to pursue his chosen profession. The Court's application of the Act violates the due process clause of the United States Constitution and the due course of law clause of the Texas Constitution.

* * * *